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Procedures for Transportation Workplace Drug and Alcohol Testing Programs; Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities; Final Rules

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket OST–99–6578]

RIN 2105–AD02

Procedures for Transportation Workplace Drug and Alcohol Testing Programs; Technical Amendments

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: The Department of Transportation is making a series of technical amendments to its drug and alcohol testing procedural rule, which goes into effect August 1, 2001. The purpose of these technical amendments is to clarify certain provisions of the rule and address omissions or problems which have been called to our attention since the publication of the final rule in December 2000.

DATES: This rule is effective August 1, 2001.

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SUPPLEMENTARY INFORMATION: The Department of Transportation published revised procedures for its drug and alcohol testing program (49 CFR Part 40) on December 19, 2000 (65 FR 79462). This revised rule goes into effect, in its entirety, on August 1, 2001, replacing the previous version of Part 40. The new Part 40 is a comprehensive revision of the Department's testing procedures, making numerous and detailed substantive and organizational changes in the regulation. Not surprisingly for a document of this magnitude, we have noticed—and interested persons have called to our attention—instances in which the text of various sections of the regulation should be clarified or errors, omissions, or problems should be corrected.

This technical amendments document is intended to make these clarifications and corrections. The technical amendments were prepared with the intention of going into effect on August 1, 2001, so that users of the regulation will have the opportunity to use the amended version of the regulation without any delay. In the event that publication of the rule does not occur until after August 1, we request that interested parties be guided by the amended provisions of the rule, which we will have posted on our docket and web site by that date. In particular, we emphasize the Department's intention that validity testing remain voluntary at this time. Because we realize that regulated parties will have had little time to incorporate these technical amendments, the Department, in its implementation and enforcement work, will provide a reasonable time to permit parties to make necessary changes in their procedures to comply with these amendments.

Section 40.3 Definitions

The Department is adding a new definition of ''invalid drug test.'' This term is used in the new Federal Custody and Control Form (CCF) that becomes mandatory on August 1, but was not previously defined in Part 40. This definition is also expected to be included in the forthcoming Department of Health and Human Services (HHS) proposed amendments to their Mandatory Guidelines for drug testing.

In the definition of ''designated employer representative (DER),'' we are making a clarification by explicitly adding the function of ''causing employees to be removed from these [i.e., safety-sensitive] functions.'' This addition is to cover the situation where the DER does not personally and directly remove the individual from safety-sensitive functions, but, for example, calls the individual's supervisor, who effects the actual removal.

Section 40.27 May an Employer Require an Employee To Sign a Consent or Release in Connection With the DOT Drug and Alcohol Testing Program?

Part 40 states that service agents cannot require an employee to sign a consent, release, waiver of liability, or indemnification agreement with respect to any part of the DOT drug or alcohol testing process. We inadvertently omitted language applying this same prohibition to employers. Lately, we have become aware that some employers and others are forcing employees to sign such documents. We want to clarify that no one can do so either on their own or a service agent's behalf. This new section and a parallel change in § 40.355 provide this clarification.

Section 40.33 What Training Requirements Must a Collector Meet?

In new § 40.208, the Department is changing the procedure for handling a situation in which a collector fails to record the specimen temperature. Since this mistake is no longer one that will require cancellation of a test, error correction training will not apply in that case. The purpose of the amendment to § 40.33(c)(2) is to clarify that we intend all monitors (i.e., persons who make sure that collector trainees successfully complete the mock collections required by the rule) to have successfully completed qualification training for collectors, even if they have had a year's training experience or a train the trainer course.

Section 40.45 What Form Is Used To Document a DOT Urine Collection?

The Department has become aware that employers and collection sites, in some cases, are having a very difficult time obtaining copies of the new CCF that becomes mandatory on August 1, 2001. There may be some confusion among laboratories and other parties concerning whether DOT and HHS really mean that all Federal collections beginning August 1 must be conducted on the new form. The Department has added a paragraph to this section to emphasize that use of the new form is mandatory and that participants must stop using the old form.

This new paragraph provides that participants must not use a non-Federal form or an expired Federal form (like the old CCF) to conduct a DOT urine collection. Laboratories, C/TPAs and other parties that distribute CCFs to employers, collection sites, or other customers must not send any more copies of the old CCF to these participants. Parties who distribute forms must also affirmatively notify other participants that they must not use the expired Federal form.

The Department is also making changes to §§ 40.83, 40.203, and 40.205 concerning the requirement to use the new CCF and corrective action that must be taken if the old CCF is used.

In addition, we are aware that some employers may wish to use C/TPAs to receive and maintain CCFs that come directly from the collection site. When this is the case—and we emphasize that this is the employer's choice, not the C/TPA's—the employer may use the C/TPA's mailing address in place of its own. Other employer information, such as name, telephone, and fax number, must remain on the CCF. The entry would read like this: Joe's Trucking

Company; Phone 202–555–5555; (fax) 202–555–5556; c/o CTPA's name and address.

Section 40.47 May Employers Use the CCF for Non-Federal Collections or Non-Federal Forms for DOT Collections?

We have changed the word ''non-DOT'' to ''non-Federal'' to avoid confusion. The CCF is a joint DOT–HHS product that may be used for Federal drug testing programs subject to the HHS Mandatory Guidelines as well as to the DOT drug testing program.

Section 40.65 What Does the Collector Check for When the Employee Presents a Specimen?

Section 40.65 (c)(3) describes a situation where an employee refuses to provide another specimen where required. The current rule requires the collector to first notify the DER and then discard the specimen. This procedure should be reversed, i.e., the collector should discard the specimen first and then notify the DER. Otherwise the collector, who may not be able to get hold of the DER right away, would have to retain the urine specimen until such time that the DER is contacted. Also the reference to § 40.191(a)(3) is inappropriate for this paragraph and has been corrected to refer to § 40.191(a)(4).

Section 40.67 When and How Is a Directly Observed Collection Conducted?

Section 40.67(d)(2) directs the collector to ''explain to the employee the reason under this part for a directly observed collection under paragraph (c)(2) through (4) of this section.'' However, there is no paragraph (4). Additionally, paragraph (c)(1) should be included in the collector's explanation of why an observed collection is being conducted, i.e., because the employer required it; the employee, if not told by the employer, is certainly entitled to know this and the collector would have that information. A corrected reference is needed in paragraph (c)(1). Lastly, the collector will inform the employee of the reason for a direct observation collection if the collector knows the reason. If all the collector knows is that the employer ordered the direct observation collection, then that is all the information that the collector will be able to provide the employee.

When a collector learns that a directly observed test should have occurred, but did not, it is the collector's responsibility to correct the omission. For example, suppose the initial specimen was out of temperature range, but the collector forgot to require a directly observed recollection. When the laboratory points out this problem to the collector, the collector would contact the employer. The employer, in turn, would contact the employee and direct the employee to undergo an immediate recollection under direct observation, even though some time may have passed since the original collection.

Section 40.69 How Is a Monitored Collection Conducted?

There have been some questions as to whether or not we meant to change the meaning of ''medical professional'' mentioned at § 40.69 with respect to someone acting as a collection monitor. We did not. We still want doctors, nurses, and licensed medical technicians to be able to be monitors even if not the same gender, and we do not believe secretaries, receptionists, or records clerks are appropriate to perform this function (unless of the same gender as the donor). If there is any doubt about the qualifications of others, such as an Emergency Medical Technician or a phlebotomist, the ''litmus test'' would be whether or not that individual is licensed or certified to practice as a medical professional in a state (i.e., approved by state action). If they meet that requirement, they would be allowed to be opposite-gender monitors. In paragraph (c), we are correcting the language to refer to the ''monitor'' rather than the ''observer.''

Section 40.71 How Does the Collector Prepare the Specimens?

Section 40.71 tells the collector how to prepare the specimen; it does not state what to do with any ''left over'' urine. There have been questions about the employee being able to take the ''excess'' urine with him/her, if any adulteration tests could be performed, or if any additional medical tests could be conducted on the excess specimen. This new paragraph clarifies these matters and incorporates an existing DOT interpretation that excess urine can be used in clinical urinalysis (e.g., specific gravity, protein, glucose) if the DOT specimen is collected in conjunction with a physical examination required by a DOT agency.

Section 40.73 How Is the Collection Process Completed?

Paragraph (a)(9) of this section mentions that the collector must fax or otherwise transmit the appropriate CCF copies to the MRO and DER. While we do not believe a regulatory text is change is necessary to make the point, we want to clarify that we view documents sent by fax as originals for purposes of this section. For example, the collector may fax the MRO copy of the CCF to the MRO. Since the MRO now has what we regard as an original, the collector could discard the MRO copy 30 days later.

Section 40.83 How Do Laboratories Process Incoming Specimens?

We have revised this section to clarify the handling of certain problems concerning collections. As provided in new § 40.208 below, we are no longer requiring the cancellation of a test because the collector omitted checking the temperature box and did not include a comment concerning the omission in the remarks section of the CCF. While this error still must be corrected, we do not believe it is necessary to cancel the test, since this is an error that does not diminish the rule's protections for the fairness of the testing process to the employee.

In addition, this section is changed be consistent with the clarification of the responsibilities of laboratories, C/TPAs and other parties to distribute and use only the new CCF. For three months, until the end of October 2001, use of expired ''old'' CCF, will not result in cancellation or rejection of a test, even if an appropriate correction is not made. Beginning November 1, the laboratory must report this situation (i.e., expired form used, correction not made) as ''rejected for testing'' with the appropriate remarks. We note that this change in timing applies only to use of the expired Federal CCF. When a non-Federal form is used at any time, the error must be corrected or the test must be rejected.

Section 40.89 What Is Validity Testing, and Are Laboratories Required To Conduct It?

When the Department published its final rule in December 2000, we anticipated that HHS would amend its Mandatory Guidelines for drug testing establishing final requirements for validity testing by HHS-certified laboratories. HHS is continuing to work on this project, but the HHS amendment will not be published by August 1, 2001. The Department believes that it is advisable to wait until HHS has completed its amendment to make validity testing mandatory for all DOT specimens. Consequently, we are changing the language of paragraph (b) of this section to eliminate the requirement that laboratories conduct validity tests on each DOT specimen. In its place, we are inserting language from our existing regulation providing that laboratories are authorized to conduct validity testing. This means that no change in validity testing will take place on August 1, 2001. We will amend this

section again to mandate validity testing when HHS issues its final amendment.

Section 40.97 What Do Laboratories Report and How Do They Report It?

Current § 40.97(a) limits reporting to one result. We have already seen incidents where multiple results can occur because of adulterants. Recently one laboratory had a confirmed cocaine positive, but an adulterant prevented the laboratory from obtaining a satisfactory result for marijuana (neither negative, positive or adulterated). The final result should have been ''positive—cocaine'' as well as ''invalid—with remark.'' By adding ''or more'' to the introductory text of paragraph (a), we are clarifying that it is proper to report such a multiple result.

The changes to paragraph (b)(1)(i) and (2) are designed to clarify the information to be provided on an electronic results report. The MRO needs to know where the test was performed. Since some laboratories have multiple laboratory sites, a name of the laboratory on the electronic report will not suffice to identify where the test was performed. HHS has indicated that the MRO's name and the certifying scientist's name would help laboratory inspectors who will be comparing electronic results with CCFs. The MRO name is also needed to ensure that the report goes to the right person. The Certifying Scientist's name is also needed in case the MRO needs to contact the laboratory for additional information and communication. The collector's name and phone number are needed in case someone needs to contact the collector for information or to take corrective action. Laboratories have been utilizing electronic reports since the outset of the program. Many of these reports contain information that is not contained on the CCF—the ''official '' report. Since it is likely that the electronic results report will replace the CCF for the majority of negative reports, additional information should no longer appear on the electronic report.

Section 40.121 Who Is Qualified To Act as an MRO?

There have been questions about when the first round of CEU hours and refresher training are required for previously trained MROs and BATs/STTs, respectively. The Department did not intend to have people who had already met qualification training requirements to face an immediate CEU or refresher-training requirement as soon as the regulations went into effect. Therefore, we are clarifying this section to specify that all MROs who were trained and examined before August 1, 2001 have until August 1, 2004 to complete their first round of CEUs. Likewise BATs/STTs who completed qualification training before January 1, 1998 would have until January 1, 2003, to complete refresher training, and we have amended § 40.213 to this effect.

Section 40.127 What Are the MRO's Functions in Reviewing Negative Test Results?

We have corrected paragraph (g) by inserting the word ''perform,'' which had been omitted. We also added a sentence to provide instructions on how to complete the CCF when a negative result is canceled.

Section 40.129 What Are the MRO's Functions in Reviewing Laboratory Confirmed Positive, Adulterated, Substituted, or Invalid Test Results?

The current § 40.129 does not contain instructions on completing the CCF when the MRO cancels a positive, adulterated, substituted, or invalid drug test report. This amendment provides clarified instructions on how the MRO should complete the CCF in this circumstance.

Section 40.131 How Does the MRO or DER Notify an Employee of the Verification Process After a Confirmed Positive, Adulterated, Substituted, or Invalid Test Result?

We have been asked whether § 40.131(d) means that the employee can contact the MRO at his or her leisure, just as long as it is within the next 72 hours. We are clarifying the provision to direct the employer to tell the employee to contact the MRO immediately. The employee would not violate the rule by not doing so, however. Of course, if the employee fails to contact the MRO within 72 hours, the MRO may declare the test a ''non-contact positive.'' This amendment would also direct the employer to warn the employee of this consequence.

Section 40.135 What Does the MRO Tell the Employee at the Beginning of the Verification Interview?

Part 40 requires that MROs must report the use of any legally prescribed medication that could make the employee medically unqualified or pose a significant safety risk. Before doing so, however, this section tells MRO to contact the employee's physician to determine if the medication could be changed to one that does not make the employee unqualified to perform safety sensitive functions. We believe that it is likely to be easier and faster for the employee to contact his or her own physician and instruct that physician to contact the MRO. This would be more efficient than to require that the MRO repeatedly call the other physician. Employees can greatly assist the likelihood of this conversation by explaining their desire and motivation to their own treatment physician, and instructing that physician to contact the MRO on their behalf.

In addition, because the employee's use of the medication can pose a safety problem immediately, we believe that the contact with the prescribing physician should occur after, rather than before, the provision of information to the employer. To facilitate this process, the revised paragraph (e) of this section gives the employee 5 days to have his or her physician contact the MRO for this purpose. If the prescribing physician comes up with a prescription that will obviate the safety problem, the MRO would so inform the employer.

Section 40.149 May the MRO Change a Verified Positive Test Result or Refusal To Test?

The Department has received a number of questions about the provision of this section, which provides, in its present form, that the MRO is the only person authorized to change a verified test result. Most of the questions concerned the effect of this provision on the authority of arbitrators, grievance examiners, etc. to review test results.

The Department makes the MRO the key person in determining the disposition of a non-negative laboratory result. The MRO is directed to bring his or her professional training and experience to bear on questions such as whether there is a legitimate medical explanation for a positive, adulterated, or substituted test result. The Department believes strongly that the medical judgment of the MRO on these questions should not be overturned by arbitrators, employers, or other participants in the drug testing program. Consequently, we have clarified paragraph (c) to emphasize that MROs have sole authority to make medical judgments about drug test results and that arbitrators and other participants in the system do not have authority to overturn these judgments.

This is not to say that an arbitrator is precluded from requiring a test result to be canceled on other grounds (e.g., a fatal flaw in the chain of custody, the failure of the MRO to provide an opportunity for the employee to present evidence of an alleged legitimate medical explanation, the denial of the right to have a split specimen tested). But an arbitrator could not decide, in the face of an MRO's judgment that

there was not a legitimate medical explanation, that the employee had presented a legitimate medical explanation. This rule is intended to prevent such a substitution of judgment about a matter committed to the expertise of the MRO.

Section 40.151 What Are MROs Prohibited From Doing as Part of the Verification Process?

Despite a clear explanation of the present § 40.151(b) in the preamble, some MROs have misunderstood the present provision to be more sweeping than intended, and to constitute a sort of gag rule on MROs concerning contacts with collectors. The objective of this provision is not to preclude discussions between MROs and collectors. It is to protect MROs from being cast in the role of judge and jury in ''he said/she said'' disputes between employees about what occurred during the collection.

For example, suppose the employee tells the MRO that the collector left the open collection container unguarded and unobserved in a public space. The collector just as strongly denies the allegation. The MRO is not in a good position to evaluate the facts of the dispute or the credibility of the employee and collector. That is a function best left to other decisionmakers, such as arbitrators or the courts. Based on language in the final rule's preamble, paragraph (b) has been rewritten to focus on this point. Note that this paragraph focuses on disputes: nothing in the paragraph precludes an MRO from taking corrective action in a situation in which it is undisputed that an error took place (e.g., the collector and employee agree that a mistake requiring correction was made).

Section 40.155 What Does the MRO Do When a Negative or Positive Test Result Is Also Dilute?

The current 40.155(c) instructs MROs in handling dilute test results—both positive and negative. Laboratories are provided instructions for reporting two categories of test results in 40.97—negative results and non-negative results. The requirements of 40.155(c) treat a negative-dilute result as a non-negative result (by requiring that the MRO receive Copy 1 from the laboratory). A negative-dilute result is still a negative result and to change the laboratory reporting requirements may connote undue suspicion on the result. The Department places negative and negative-dilute test results in the negative reporting category. All other results are considered non-negative. Effective and efficient notification can be made to the employer for a negative-dilute result in the same manner that notification is made for a negative result. Any further action on a negative-dilute (see § 40.197) would be a function of the employer's policy.

Section 40.163 How Does the MRO Report Drug Test Results?

Commenters on the Part 40 proposed rule advocated greater use of electronic means to transmit negative results from MROs to employers. In the final rule preamble, we said that we agreed. One area in which greater reliance on electronic methods appears workable is the treatment of negative test reporting in this section.

Allowing for electronic reporting of negatives by MROs is consistent with the direction in which we have headed allowing more utilization of electronic capabilities (e.g., 40.97) by laboratories. However, current § 40.163 does not specifically allow anything special for electronic reports for negatives as the preamble suggested we favored; in fact, reporting requirements in current § 40.163 reference all reports being ''in writing.'' We have modified this section to remove this obstacle to electronic reporting of negatives.

A related change involves duplicate instructions of §§ 40.127 and 40.163. Currently, both require MRO to initial or sign the CCF. The second initial/signing has been removed from § 40.163.

Section 40.167 How Are MRO Reports of Drug Results Transmitted to Employers?

The Department is revising paragraph (c) of this section to clarify reporting requirements in view of the greater authorization for electronic reporting of negative results. In addition, we are adding a new paragraph (e) to parallel the prohibition of reversals of MROs medical judgments as provided in § 40.149(c).

Section 40.187 What Does the MRO Do With Split Specimen Laboratory Results?

The Department is adding two new paragraphs to this section to fill gaps that have been called to our attention since we published the final rule. The first is a situation in which, for example, the primary specimen tests positive for a drug but the split specimen test is invalid (see new paragraph (e)). In this case (parallel to the situation in which the split specimen is unavailable for testing) the test is cancelled and the employer must require the employee to undergo an immediate recollection under direct observation.

The second is a hopefully rare situation in which the primary specimen tests positive for a drug, and the split specimen does not reconfirm the presence of the drug but the laboratory determines that an adulterant is present (see new paragraph (f)). In this case, we do not have a reconfirmed positive drug test. On the other hand, we do have a laboratory finding that, were it made with respect to the primary specimen, would be the basis of a refusal result.

We do not believe it is sound policy, and consistent with our safety objectives, to ignore this adulteration result. On the other hand, we believe it is important to provide appropriate due process protections for employees in this situation. Consequently, the MRO will contact the employee and ask whether there is any legitimate medical explanation for the presence of the adulterant in the split specimen. If there is a legitimate medical explanation, the entire test is cancelled. If not, the MRO reports the test to the employee and DER as a refusal. The employee will have 72 hours to request a test of the primary specimen to determine if the adulterant is present there as well. Except that this is a test of the primary specimen, taking place at the laboratory that originally tested the primary specimen, this test is intended to parallel the testing of the split specimen in the more usual type of case. If the test of the primary specimen reconfirms the presence of the adulterant found in the split specimen, then the refusal result is reconfirmed. If not, then the test is cancelled and the ''split invalid'' procedure of paragraph (e) applies.

Section 40.191 What Is a Refusal To Take a DOT Drug Test, and What Are the Consequences?

In paragraph (a) of this section, we are making a number of changes to clarify the application of the refusal provisions of the rule to pre-employment testing. In the case of pre-employment testing, it is very possible for applicants to fail to appear for a test for a number of legitimate reasons (e.g., took another job, decided they did not want to change their present job, decided they didn't want to work for a particular employer). In this situation, we believe it would be unfair to visit the consequences of a refusal (e.g., having to complete the return-to-duty process, certificate actions under some DOT agency regulations) on the applicant (§ 40.191(a)(1)).

For example, suppose someone has applied to both Company A and Company B for a job. Both companies tell him that they want to offer him a

job, but that he will have to have a pre-employment test before they can actually hire him. Each company schedules the employee for a pre-employment test. Before the tests occur, the employee decides that since Company A will pay him more, he prefers to work for Company A. He takes the pre-employment test scheduled by Company A, but not the one scheduled by Company B, since he is no longer interested in working for Company B. In this situation, we would not view the individual as having refused a test by not having attended Company B's scheduled test. In addition, in the pre-employment test context, there can be situations in which an employee could legitimately leave a collection site before the test actually commences (e.g., there is a long wait for the test and the employee has another obligation). By the commencement of the test, we mean the actions listed in § 40.63(c), in which the collector or employee selects a collection container. Once the collection has commenced, the donor has committed to the process, and must complete it. If the employee then leaves before the process is complete, or takes another action listed in this section as a refusal, the consequences of a refusal attach. However, if the employee leaves the site before the test commences, then the employee is in the same situation as someone who does not appear at all for the pre-employment test. The consequences of a refusal do not attach in this situation (§ 40.191(a)(2) and (3)).

If a medical evaluation or examination is required as part of a pre-employment drug test process, the requirement could raise questions of consistency with the employment provisions of the Americans with Disabilities Act, as implemented by Equal Employment Opportunity Commission (EEOC) regulations and guidance. It is not the drug test itself that raises these issues, only the medical examination or evaluation that follows it (e.g., in the context of a ''shy bladder'' situation). To avoid raising ADA issues, we have added a sentence providing that an employee is deemed to have refused to test on the basis of not undergoing such an examination only if the pre-employment test is conducted following a contingent offer of employment (§ 40.191(a)(7)).

We are also making two minor changes to this section. In paragraph (a)(1), we are adding a reference to consistency with DOT agency drug regulations, which may establish time frames for sending employees for random or other tests. In paragraph (d), we have deleted a potentially confusing reference to use of a separate document and clarify that the employee's name should be entered on Copy 2 of the CCF.

We also note that there may be a few situations in which an employee may legitimately not go the collection site for a pre-employment test.

Section 40.193 What Happens When an Employee Does Not Provide a Sufficient Amount of Urine for a Drug Test?

For consistency with other parts of the rule, we have deleted the word ''working'' from the phrase ''five working days.'' We have also added a requirement to document on the CCF the time at which the three-hour period to drink fluids begins and ends in a ''shy bladder'' situation. The intent of this requirement is to avoid questions about whether the proper amount of time was given to the employee. If the collector omits this information, it does not result in the cancellation of the test (see § 40.209). We have also clarified the rule by saying that an employee who leaves the collection site before the ''shy bladder'' collection process is complete has refused to test.

Section 40.195 What Happens When an Individual Is Unable To Provide a Sufficient Amount of Urine for a Pre-Employment, Follow-Up, or Return-to Duty Test Because of a Permanent or Long-term Medical Condition?

We have added follow-up tests to this provision since they, like pre-employment and return-to-duty tests, require employees to have a negative test result in order to meet regulatory requirements for safety-sensitive employment.

Section 40.203 What Problems Cause a Drug Test To Be Cancelled Unless They Are Corrected?

There are two changes to this section. We are no longer treating the failure of the collector to check the temperature box and to annotate the remarks section concerning temperature as a flaw that results in cancellation unless it is corrected. This is still an error in the collection that needs to be corrected (see § 40.208 below), but it is not a mistake that undermines the protections afforded the employee. Checking the temperature is important as a means of detecting attempts to adulterate or substitute the specimen, but omitting this step does not make the process less fair for the employee.

The second change underlines the importance of using the new CCF, which becomes mandatory on August 1, 2001. Beginning on that date, the old Federal CCF will have expired, and its use is no longer authorized. It will have the same status as a non-Federal form. That is, if a non-Federal or expired Federal form is used for a test, the test must be cancelled unless the error is corrected as provided in § 40.205. We are concerned about reports that, almost a year after use of the new form was authorized, many employers and collection sites are having difficulty obtaining copies of the new CCF from their laboratories and/or C/TPAs. We are providing a 90-day grace period during which the failure to correct the use of an obsolete Federal form will not result in the cancellation of a test. After that, participants who fail to correct the use of the expired Federal form will bear the consequences of a cancelled test.

Section 40.205 How Are Drug Test Problems Corrected?

We have amended paragraph (b)(2) to specify that this correction procedure applies to the use of expired Federal forms as well as to non-Federal forms. The content of the correction document has also been clarified.

Section 40.208 What Problem Requires Corrective Action But Does Not Result in the Cancellation of a Test?

This is a new section focusing on the temperature box checkoff issue described in connection with § 40.203 above. This section requires correction of the error (i.e., through an MFR). However, the error does not result in the cancellation of a test. When a collector makes this error, the collector is not required to undergo error correction training. However, the employer, C/TPA, collection site, etc. responsible for the collector should take appropriate steps to ensure that the collector does not repeat the mistake.

Section 40.209 What Procedural Problems Do Not Result in the Cancellation of a Test and Do Not Require Corrective Action?

We have modified the title of this section to avoid confusion with the title of new § 40.208. We also have added reference to service agents as a party who are subject to potential consequences for errors that do not result in the cancellation of tests, through the ''PIE'' provisions of Subpart R of the rule.

Section 40.213 What Training Requirements Must STTs and BATs Meet?

The final rule inadvertently changed the number of mock tests BAT and STT trainees had to complete. We have amended this section to maintain the status quo with respect to the testing

requirements established by the DOT Model Course. In addition, to avoid requiring some previously trained BATs and STTs to complete refresher training too quickly, we have added a sentence saying individuals trained before January 1, 1998, have until January 1, 2003, to get refresher training.

Section 40.225 What Form Is Used for an Alcohol Test?

To make the transition to use of the new alcohol testing form easier, we are making use of the new ATF mandatory as of February 1, 2002. Use of the new form is authorized now. To maintain consistency between use of the old form and the instructions in new Part 40, employees should be asked to sign Statement 4 only if their test result is .02 or higher. We have also modified paragraph (b)(4) to clarify that there are a number of options for the coloring of ATFs.

Section 40.229 What Devices Are Used To Conduct Alcohol Screening Tests?

Only alcohol screening devices (ASDs) on the National Highway Traffic Safety Administration's Conforming Products List (CPL) may be used for DOT alcohol screening tests. This is a necessary, but not sufficient, condition for using an ASD. It is possible that there may be devices added to the CPL that do not have instructions for their use incorporated in Part 40. Until and unless instructions for properly using the device in the context of DOT alcohol testing appear in Part 40, it is not permissible to use such a device for DOT alcohol tests. The Department is adding a sentence to this section making this point explicit.

Section 40.253 What Are the Procedures for Conducting an Alcohol Confirmation Test?

We have substituted the word ''unique'' for the word ''sequential'' to avoid any unnecessary conflict with EBTs that may not, as such, provide sequential numbers. Unique numbers for each test, even if not sequential, provide sufficient identification of the test.

Section 40.261 What Is Refusal To Take an Alcohol Test, and What Are the Consequences?

We have modified § 40.261(a)(1)–(3) to be consistent with § 40.191, with respect to refusals of pre-employment tests.

Section 40.281 Who Is Qualified To Act as a SAP?

In the final rule's preamble discussion concerning qualification training for substance abuse professionals (SAPs), the Department commented that ''* * * the Department does not believe that this examination needs to be a formally designed and validated examination,'' suggesting that the examination could be simpler than the examinations administered by existing MRO training groups (65 FR 79507). In discussions with participants in the drug and alcohol testing program, this approach has been questioned. As a result of this discussion, we have re-thought this position. No regulatory text changes are needed as a result of this change in our thinking.

It is now the Department's policy that a nationally-recognized SAP training organization that constructs an examination should have the examination validated by an outside test evaluation organization (as MRO groups have done for their tests) or by an effective peer review. The validation process would include a discussion of test items, areas of knowledge tested, and the effectiveness with which the test items measure the areas of knowledge involved. It should also include a psychometric review that evaluates how the items and questions are structured. The review should suggest modifications to the examination, if needed, to improve its quality.

We emphasize that we are not requiring that an outside organization actually develop, administer, score, or grade the test, but simply review and evaluate the examination to make sure it was a good measure of what SAP trainees are supposed to learn. For this reason, we believe the cost of the process is modest. The information we have learned from sources in the testing business suggests that one could expect a review of the kind we envision for around $10,000.

Section 40.329 What Information Must Laboratories, MROs, and Other Service Agents Release to Employees?

Part 40 requires a Substance Abuse Professional (SAP) to provide an employee, upon request, a copy of SAP reports. We have heard concerns expressed by SAPs and employers that providing a report containing the follow-up testing plan will give the employee the number and frequency of follow-up testing. We do not believe that an employee returning to duty following a rule violation should have access to the follow-up testing plan, which could lessen the deterrent effect of follow-up tests. Therefore, we are directing SAPs to remove follow-up testing information from SAP reports they provide to employees.

Section 40.331 To What Additional Parties Must Employers and Service Agents Release Information?

The Department is concerned that DOT agency representatives may not be able to effectively inspect or audit electronically stored records, data, and information. Therefore, the Department will require that all records and data be presented in such a way that they can be easily reviewed. If electronic records do not meet this ''auditable'' standard, the electronic documentation must be changed into printed format. This is a reasonable requirement to impose on employers and other parties who take advantage of the greater flexibility and cost savings provided by opportunities for electronic data management permitted under Part 40. In addition, to avoid any possible confusion, we have specifically directed both employers and service agents to meet DOT agency timing requirements for production of records to inspectors or other DOT officials (e.g., two business days for FMCSA).

Section 40.333 What Records Must Employers Keep?

We have received questions asking whether the regulation is intended to require the retention of information concerning blind as well as employee specimens. We do intend for blind specimen records to be retained. To avoid potential uncertainty on this point, we have removed the word ''employee'' from paragraphs (a)(1)(i) and (ii) of this section, so that the language refers to all specimens. We have also added a new paragraph (e), which parallels the language discussed under § 40.331 above concerning ''auditable'' electronic records.

Section 40.349 What Records May a Service Agent Receive and Maintain?

We made this change for terminological consistency with § 40.333(d).

Section 40.355 What Limitations Apply to the Activities of Service Agents?

One of the limitations on service agent activities is a prohibition on requiring employees to sign consents, waivers etc. We have added a sentence to this paragraph to specify that no one else (e.g., an employer) can do so for the service agent. In addition, in response to comments on the DOT agency

conforming rules, we have deleted the requirement for DOT agency rule authorization for C/TPAs to declare a refusal in the case of an owner-operator who fails to appear for a test.

Section 40.403 Must a Service Agent Notify Its Clients When the Department Issues a PIE?

We made this change for terminological consistency with other provisions of the rule.

Appendix F

We have added a few sections to the drug testing information list in this appendix to correspond to other changes we have made in Part 40 or to correct earlier omissions.

Regulatory Notices and Analyses

This rule is a non-significant rule both for purposes of Executive Order 12886 and the Department of Transportation's Regulatory Policies and Procedures. The Department certifies that it will not have a significant economic effect on a substantial number of small entities, for purposes of the Regulatory Flexibility Act. The Department makes these statements on the basis that, as a series of technical amendments that correct or clarify existing regulatory provisions, this rule will not impose any significant costs on anyone. The costs of the underlying Part 40 final rule were analyzed in connection with its issuance in December 2000. Therefore, it has not been necessary for the Department to conduct a regulatory evaluation or Regulatory Flexibility Analysis for this final rule.

This rule imposes no information collection requirements for which Paperwork Reduction Act approval is needed. It has no Federalism impacts that would warrant a Federalism assessment. The amendments made in this rule are technical, corrective, and clarifying changes to an existing rule that went through an extensive public notice and comment process. The amendments do not make significant substantive changes to Part 40, and we would not anticipate the receipt of meaningful comments on them. However, it is essential that these technical amendments take effect on August 1, 2001, with the rest of the new Part 40. Delaying these amendments for a prior comment period would be unnecessary and contrary to the public interest, as it would result in participants having to implement an uncorrected version of the rule and then make changes in the midst of implementing the new rule. For the same reasons, the Department has good cause to make the changes effective in less than 30 days.

List of Subjects in 49 CFR Part 40

Administrative practice and procedure, Alcohol abuse, Alcohol testing, Drug abuse, Drug testing, Reporting and recordkeeping requirements, Safety, Transportation.

Issued this 24th day of July, 2001, at Washington, DC.

Norman Y. Mineta,

Secretary of Transportation.

For the reasons set forth in the preamble, the Department of Transportation amends 49 CFR Part 40 as follows:

PART 40—PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS

1. The authority citation for 49 CFR Part 40 continues to read as follows:

Authority: 49 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 45101 *et seq.*

2. Amend § 40.3 as follows:

a. In the definition of ''Designated employer representative (DER)'', add the words '', or cause employees to be removed from these covered duties,'' after the word ''duties'';

b. Add a definition of ''Invalid drug test'' in alphabetical order to read as follows:

§ 40.3 What do the terms used in this regulation mean?

* * * * *

Invalid drug test. The result of a drug test for a urine specimen that contains an unidentified adulterant or an unidentified interfering substance, has abnormal physical characteristics, or has an endogenous substance at an abnormal concentration that prevents the laboratory from completing or obtaining a valid drug test result.

* * * * *

3. In subpart B, redesignate § 40.27 as § 40.29, and add a new § 40.27, to read as follows:

§ 40.27 May an employer require an employee to sign a consent or release in connection with the DOT drug and alcohol testing program?

No, as an employer, you must not require an employee to sign a consent, release, waiver of liability, or indemnification agreement with respect to any part of the drug or alcohol testing process covered by this part (including, but not limited to, collections, laboratory testing, MRO and SAP services).

§ 40.33 [Amended]

4. Amend § 40.33 (c)(2) introductory test, in the second sentence, to remove the words ''an individual'' and add in their place the words ''a qualified collector''.

5. Amend § 40.45 as follows:

a. In paragraph (a), revise the HHS web site address ''(http://www.health.org/workpl.htm)'' to read ''(http://www.workplace.samhsa.gov)''.

b. Redesignate paragraphs (b), (c), and (d), as paragraphs (c), (d), and (e), respectively.

c. Add a new paragraph (b).

d. Add a sentence at the end of newly redesignated paragraph (c)(2) to read as follows:

§ 40.45 What form is used to document a DOT urine collection?

* * * * *

(b) You must not use a non-Federal form or an expired Federal form to conduct a DOT urine collection. As a laboratory, C/TPA or other party that provides CCFs to employers, collection sites, or other customers, you must not provide copies of an expired Federal form to these participants. You must also affirmatively notify these participants that they must not use an expired Federal form (e.g., that beginning August 1, 2001, they may not use the old 7-part Federal CCF for DOT urine collections).

(c) * * *

(2) * * * The employer may use a C/TPA's address in place of its own, but must continue to include its name, telephone number, and fax number.

* * * * *

§ 40.47 [Amended]

6. Amend § 40.47 by removing the word ''non-DOT'' and adding in its place the word ''non-Federal'' in the heading of the section, in paragraph (a), and in paragraph (b)(2).

7. Amend § 40.65 by revising paragraph (c)(3) to read as follows:

§ 40.65 What does the collector check for when the employee presents a specimen?

* * * * *

(c) * * *

(3) In a case where the employee refuses to provide a specimen under direct observation (see § 40.191(a)(4)), you must discard any specimen the employee provided previously during the collection procedure. Then you must notify the DER as soon as practicable.

8. Amend § 40.67 by revising paragraphs (c)(1) and (d)(2) and adding a new paragraph (m), to read as follows:

§ 40.67 When and how is a directly observed collection conducted?

* * * * *

(c) * * *

(1) You are directed by the DER to do so (see paragraphs (a) and (b) of this section); or

* * * * *

(d) * * *

(2) As the collector, you must explain to the employee the reason, if known, under this part for a directly observed collection under paragraphs (c)(1) through (3) of this section.

* * * * *

(m) As the collector, when you learn that a directly observed collection should have been collected but was not, you must inform the employer that it must direct the employee to have an immediate recollection under direct observation.

9. Amend § 40.69 by revising paragraphs (b) and (c) to read as follows:

§ 40.69 How is a monitored collection conducted?

* * * * *

(b) As the collector, you must ensure that the monitor is the same gender as the employee, unless the monitor is a medical professional (e.g., nurse, doctor, physician's assistant, technologist, or technician licensed or certified to practice in the jurisdiction in which the collection takes place). The monitor can be a different person from the collector and need not be a qualified collector.

(c) As the collector, if someone else is to monitor the collection (e.g., in order to ensure a same-gender monitor), you must verbally instruct that person to follow the procedures of paragraphs (d) and (e) of this section. If you, the collector, are the monitor, you must follow these procedures.

* * * * *

10. Amend § 40.71 by adding a new paragraph (b)(8), to read as follows:

§ 40.71 How does the collector prepare the specimens?

* * * * *

(b) * * *

(8) You must discard any urine left over in the collection container after both specimen bottles have been appropriately filled and sealed. There is one exception to this requirement: you may use excess urine to conduct clinical tests (e.g., protein, glucose) if the collection was conducted in conjunction with a physical examination required by a DOT agency regulation. Neither you nor anyone else may conduct further testing (such as adulteration testing) on this excess urine and the employee has no legal right to demand that the excess urine be turned over to the employee.

11. Amend § 40.83 by revising paragraphs (e) and (f); redesignating paragraphs (g) and (h) as paragraphs (h) and (i), respectively; and adding a new paragraph (g) to read as follows:

§ 40.83 How do laboratories process incoming specimens?

* * * * *

(e) You must inspect each CCF for the presence of the collector's signature on the certification statement in Step 4 of the CCF. Upon finding that the signature is omitted, document the flaw and continue the testing process.

(1) In such a case, you must retain the specimen for a minimum of 5 business days from the date on which you initiated action to correct the flaw.

(2) You must then attempt to correct the flaw by following the procedures of § 40.205(b)(1).

(3) If the flaw is not corrected, report the result as rejected for testing in accordance with § 40.97(a)(3).

(f) If you determine that the specimen temperature was not checked and the ''Remarks'' line did not contain an entry regarding the temperature being outside of range, you must then attempt to correct the problem by following the procedures of § 40.208.

(1) In such a case, you must continue your efforts to correct the problem for five business days, before you report the result.

(2) When you have obtained the correction, or five business days have elapsed, report the result in accordance with § 40.97(a).

(g) If you determine that a CCF that fails to meet the requirements of § 40.45(a) (e.g., a non-Federal form or an expired Federal form was used for the collection), you must attempt to correct the use of the improper form by following the procedures of § 40.205(b)(2).

(1) In such a case, you must retain the specimen for a minimum of 5 business days from the date on which you initiated action to correct the problem.

(2) During the period August 1–October 31, 2001, you are not required to reject a test conducted on an expired Federal CCF because this problem is not corrected. Beginning November 1, 2001, if the problem(s) is not corrected, you must reject the test and report the result in accordance with § 40.97(a)(3).

* * * * *

§ 40.89 [Amended]

12. Amend § 40.89(b) by removing the word ''must'' and adding in its place the words ''are authorized to''.

13. Amend § 40.97 by revising the introductory text of paragraph (a) and paragraphs (b)(1)(i) and (b)((1)(ii) to read as follows:

§ 40.97 What do laboratories report and how do they report it?

(a) As a laboratory, you must report the results for each primary specimen tested as one or more of the following:

* * * * *

(b) * * *

(1) * * *

(i) If you elect to provide the laboratory results report, you must include the following elements, as a minimum, in the report format:

(A) Laboratory name and address;

(B) Employer's name (you may include I.D. or account number);

(C) Medical review officer's name;

(D) Specimen I.D. number;

(E) Donor's SSN or employee I.D. number, if provided;

(F) Reason for test, if provided;

(G) Collector's name and telephone number;

(H) Date of the collection;

(I) Date received at the laboratory;

(J) Date certifying scientist released the results;

(K) Certifying scientist's name;

(L) Results (e.g., positive, adulterated) as listed in paragraph (a) of this section; and

(M) Remarks section, with an explanation of any situation in which a correctable flaw has been corrected.

(ii) You may release the laboratory results report only after review and approval by the certifying scientist. It must reflect the same test result information as contained on the CCF signed by the certifying scientist. The information contained in the laboratory results report may not contain information that does not appear on the CCF.

* * * * *

14. Amend § 40.121 by adding a new paragraph (d)(3), to read as follows:

§ 40.121 Who is qualified to act as an MRO?

* * * * *

(d) * * *

(3) If you are an MRO who completed the qualification training and examination requirements prior to August 1, 2001, you must complete your first increment of 12 CEU hours before August 1, 2004.

* * * * *

15. Amend § 40.127 by revising the introductory text of paragraph (g) to read as follows:

§ 40.127 What are the MRO's functions in reviewing negative test results?

* * * * *

(g) Staff under your direct, personal supervision may perform the administrative functions of this section for you, but only you can cancel a test. If you cancel a laboratory-confirmed negative result, check the ''Test Cancelled'' box (Step 6) on Copy 2 of the CCF, make appropriate annotation in the ''Remarks'' line, provide your name, and sign, initial or stamp and date the verification statement.

* * * * *

16. Amend § 40.129 by redesignating paragraphs (d), (e), and (f) as paragraphs (e), (f), and (g) respectively, and by adding a new paragraph (d), to read as follows:

§ 40.129 What are the MRO's functions in reviewing laboratory confirmed positive, adulterated, substituted, or invalid test results?

* * * * *

(d) If you cancel a laboratory confirmed positive, adulterated, substituted, or invalid drug test report, check the ''test cancelled'' box (Step 6) on Copy 2 of the CCF, make appropriate annotation in the ''Remarks'' line, sign, provide your name, and date the verification statement.

* * * * *

17. Amend § 40.131 by revising the introductory text of paragraph (d) to read as follows:

§ 40.131 How does the MRO or DER notify an employee of the verification process after a confirmed positive, adulterated, substituted, or invalid test result?

* * * * *

(d) As the DER, you must attempt to contact the employee immediately, using procedures that protect, as much as possible, the confidentiality of the MRO's request that the employee contact the MRO. If you successfully contact the employee (i.e., actually talk to the employee), you must document the date and time of the contact, and inform the MRO. You must inform the employee that he or she should contact the MRO immediately. You must also inform the employee of the consequences of failing to contact the MRO within the next 72 hours (see § 40.133(a)(2)).

* * * * *

18. Amend § 40.135 by revising paragraph (e) to read as follows:

§ 40.135 What does the MRO tell the employee at the beginning of the verification interview?

* * * * *

(e) You must also advise the employee that, after informing any third party about any medication the employee is using pursuant to a legally valid prescription under the Controlled Substances Act, you will allow 5 days for the employee to have the prescribing physician contact you to determine if the medication can be changed to one that does not make the employee medically unqualified or does not pose a significant safety risk. If, as an MRO, you receive such information from the prescribing physician, you must transmit this information to any third party to whom you previously provided information about the safety risks of the employee's other medication.

19. Amend § 40.149 by revising paragraph (c) to read as follows:

§ 40.149 May the MRO change a verified positive test result or refusal to test?

* * * * *

(c) You are the only person permitted to change a verified test result, such as a verified positive test result or a determination that an individual has refused to test because of adulteration or substitution. This is because, as the MRO, you have the sole authority under this part to make medical determinations leading to a verified test (e.g., a determination that there was or was not a legitimate medical explanation for a laboratory test result). For example, an arbitrator is not permitted to overturn the medical judgment of the MRO that the employee failed to present a legitimate medical explanation for a positive, adulterated, or substituted test result of his or her specimen.

20. Amend § 40.151 by revising paragraph (b) to read as follows:

§ 40.151 What are MROs prohibited from doing as part of the verification process?

* * * * *

(b) It is not your function to make decisions about factual disputes between the employee and the collector concerning matters occurring at the collection site that are not reflected on the CCF (e.g., concerning allegations that the collector left the area or left open urine containers where other people could access them).

* * * * *

§ 40.155 [Amended]

21. Amend § 40.155 by removing paragraph (c) and redesignating paragraph (d) as new paragraph (c).

22. Revise § 40.163 to read as follows:

§ 40.163 How does the MRO report drug test results?

(a) As the MRO, it is your responsibility to report all drug test results to the employer.

(b) You may use a signed or stamped and dated legible photocopy of Copy 2 of the CCF to report test results.

(c) If you do not report test results using Copy 2 of the CCF for this purpose, you must provide a written report (e.g., a letter) for each test result. This report must, as a minimum, include the following information:

(1) Full name, as indicated on the CCF, of the employee tested;

(2) Specimen ID number from the CCF and the donor SSN or employee ID number;

(3) Reason for the test, if indicated on the CCF (e.g., random, post-accident);

(4) Date of the collection;

(5) Date you received Copy 2 of the CCF;

(6) Result of the test (i.e., positive, negative, dilute, refusal to test, test cancelled) and the date the result was verified by the MRO;

(7) For verified positive tests, the drug(s)/metabolite(s) for which the test was positive;

(8) For cancelled tests, the reason for cancellation; and

(9) For refusals to test, the reason for the refusal determination (e.g., in the case of an adulterated test result, the name of the adulterant).

(d) As an exception to the reporting requirements of paragraph (b) and (c) of this section, the MRO may report negative results using an electronic data file.

(1) If you report negatives using an electronic data file, the report must contain, as a minimum, the information specified in paragraph (c) of this section, as applicable for negative test results.

(2) In addition, the report must contain your name, address, and phone number, the name of any person other than you reporting the results, and the date the electronic results report is released.

(e) You must retain a signed or stamped and dated copy of Copy 2 of the CCF in your records. If you do not use Copy 2 for reporting results, you must maintain a copy of the signed or stamped and dated letter in addition to the signed or stamped and dated Copy 2. If you use the electronic data file to report negatives, you must maintain a retrievable copy of that report in a format suitable for inspection and auditing by a DOT representative.

(f) You must not use Copy 1 of the CCF to report drug test results.

(g) You must not provide quantitative values to the DER or C/TPA for drug or validity test results. However, you must provide the test information in your possession to a SAP who consults with you (see § 40.293(g)).

23. Amend § 40.167 by revising the section heading and paragraph (c), and adding a new paragraph (e), to read as follows:

§ 40.167 How are MRO reports of drug results transmitted to the employer?

* * * * *

(c) You must transmit the MRO's report(s) of verified tests to the DER so that the DER receives it within two days of verification by the MRO.

(1) You must fax, courier, mail, or electronically transmit a legible image or copy of either the signed or stamped and dated Copy 2 or the written report (see § 40.163(b) and (c)).

(2) Negative results reported electronically (i.e., computer data file) do not require an image of Copy 2 or the written report.

* * * * *

(e) MRO reports are not subject to modification or change by anyone other than the MRO, as provided in § 40.149(c).

24. Amend § 40.187 by redesignating paragraphs (e) and (f) as paragraphs (g) and (h), respectively, and adding new paragraphs (e) and (f), to read as follows:

§ 40.187 What does the MRO do with split specimen laboratory results?

* * * * *

(e) *Failed to Reconfirm: Specimen Results Invalid.* (1) Report to the DER and the employee that both tests must be cancelled and the reason for cancellation.

(2) Direct the DER to ensure the immediate collection of another specimen from the employee under direct observation, with no notice given to the employee of this collection requirement until immediately before the collection.

(3) Using the format in Appendix D to this part, notify ODAPC of the failure to reconfirm.

(f) *Failed to Reconfirm: Split Specimen Adulterated.* (1) Contact the employee and inform the employee that the laboratory has determined that his or her split specimen is adulterated.

(2) Follow the procedures of § 40.145 to determine if there is a legitimate medical explanation for the laboratory finding of adulteration.

(3) If you determine that there is a legitimate medical explanation for the adulterated test result, report to the DER and the employee that the test is cancelled. Using the format in Appendix D to this part, notify ODAPC of the result.

(4) If you determine that there is not a legitimate medical explanation for the adulterated test result, take the following steps:

(i) Report the test to the DER and the employee as a verified refusal to test. Inform the employee that he or she has 72 hours to request a test of the primary specimen to determine if the adulterant found in the split specimen also is present in the primary specimen.

(ii) Except that the request is for a test of the primary specimen and is being made to the laboratory that tested the primary specimen, follow the procedures of §§ 40.153, 40.171, 40.173, 40.179, and 40.185.

(iii) As the laboratory that tests the primary specimen to reconfirm the presence of the adulterant found in the split specimen, report your result to the MRO on a photocopy (faxed, mailed, scanned, couriered) of Copy 1 of the CCF .

(iv) If the test of the primary specimen reconfirms the adulteration finding of the split specimen, as the MRO you must report the test result as a refusal as provided in § 40.187(a)(2).

(v) If the test of the primary specimen fails to reconfirm the adulteration finding of the split specimen, as the MRO you cancel the test. Follow the procedures of paragraph (e) of this section in this situation.

* * * * *

25. Amend § 40.191 by revising paragraphs (a)(1), (2), (3), and (7) and the introductory text of paragraph (d), to read as follows as follows:

§ 40.191 What is a refusal to take a DOT drug test, and what are the consequences?

(a) * * *

(1) Fail to appear for any test (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA (see § 40.61(a));

(2) *Fail to remain at the testing site until the testing process is complete; Provided*, That an employee who leaves the testing site before the testing process commences (see § 40.63 (c)) for a pre-employment test is not deemed to have refused to test;

(3) Fail to provide a urine specimen for any drug test required by this part or DOT agency regulations; *Provided,* That an employee who does not provide a urine specimen because he or she has left the testing site before the testing process commences (see § 40.63 (c)) for a pre-employment test is not deemed to have refused to test;

* * * * *

(7) Fail to undergo a medical examination or evaluation, as directed by the MRO as part of the verification process, or as directed by the DER under § 40.193(d). In the case of a pre-employment drug test, the employee is deemed to have refused to test on this basis only if the pre-employment test is conducted following a contingent offer of employment; or

* * * * *

(d) As a collector or an MRO, when an employee refuses to participate in the part of the testing process in which you are involved, you must terminate the portion of the testing process in which you are involved, document the refusal on the CCF (including, in the case of the collector, printing the employee's name on Copy 2 of the CCF), immediately notify the DER by any means (e.g., telephone or secure fax machine) that ensures that the refusal notification is immediately received. As a referral physician (e.g., physician evaluating a ''shy bladder'' condition or a claim of a legitimate medical explanation in a validity testing situation), you must notify the MRO, who in turn will notify the DER.

* * * * *

26. Amend § 40.193 as follows:

a. Revise paragraphs (b)(2) and (b)(3)

b. In paragraph (c) introductory text, remove the word ''working'' before the word ''days''.

c. Add and reserve paragraph (c)(2). The revisions read as follows:

§ 40.193 What happens when an employee does not provide a sufficient amount of urine for a drug test?

* * * * *

(b) * * *

(2) Urge the employee to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours, or until the individual has provided a sufficient urine specimen, whichever occurs first. It is not a refusal to test if the employee declines to drink. Document on the Remarks line of the CCF (Step 2), and inform the employee of, the time at which the three-hour period begins and ends.

(3) If the employee refuses to make the attempt to provide a new urine specimen or leaves the collection site before the collection process is complete, you must discontinue the collection, note the fact on the ''Remarks'' line of the CCF (Step 2), and immediately notify the DER. This is a refusal to test.

* * * * *

§ 40.195 [Amended]

27. Amend § 40.195 by adding, in the section heading and in the introductory text of paragraph (a), after the word

''pre-employment'', the words '', follow-up,''.

28. Amend § 40.203 by revising paragraphs (b) and (d)(3) to read as follows:

§ 40.203 What problems cause a drug test to be cancelled unless they are corrected?

* * * * *

(b) The following is a ''correctable flaw'' that laboratories must attempt to correct: The collector's signature is omitted on the certification statement on the CCF.

* * * * *

(d) * * *

(3) The collector uses a non-Federal form or an expired Federal form for the test. This flaw may be corrected through the procedure set forth in § 40.205(b)(2), provided that the collection testing process has been conducted in accordance with the procedures of this part in an HHS-certified laboratory. During the period August 1–October 31, 2001, you are not required to cancel a test because of the use of an expired Federal form. Beginning November 1, 2001, if the problem is not corrected, you must cancel the test.

29. Amend § 40.205 by revising paragraph (b)(2) to read as follows:

§ 40.205 How are drug test problems corrected?

* * * * *

(b) * * *

(2) If the problem is the use of a non-Federal form or an expired Federal form, you must provide a signed statement (i.e., a memorandum for the record). It must state that the incorrect form contains all the information needed for a valid DOT drug test, and that the incorrect form was used inadvertently or as the only means of conducting a test, in circumstances beyond your control. The statement must also list the steps you have taken to prevent future use of non-Federal forms or expired Federal forms for DOT tests. For this flaw to be corrected, the test of the specimen must have occurred at a HHS-certified laboratory where it was tested consistent with the requirements of this part. You must supply this information on the same business day on which you are notified of the problem, transmitting it by fax or courier.

* * * * *

30. Add a new § 40.208, to read as follows:

§ 40.208 What problem requires corrective action but does not result in the cancellation of a test?

(a) If, as a laboratory, collector, employer, or other person implementing the DOT drug testing program, you become aware that the specimen temperature on the CCF was not checked and the ''Remarks'' line did not contain an entry regarding the temperature being out of range, you must take corrective action, including securing a memorandum for the record explaining the problem and taking appropriate action to ensure that the problem does not recur.

(b) This error does not result in the cancellation of the test.

(c) As an employer or service agent, this error, even though not sufficient to cancel a drug test result, may subject you to enforcement action under DOT agency regulations or Subpart R of this part.

31. Amend § 40.209 as follows:

a. Revise the heading of the section.

b. In paragraph (c), after the word ''employer'' add the words ''or service agent''.

c. In paragraph (c), after the word ''regulations'' add the words ''or action under Subpart R of this part''.

The revision reads as follows:

§ 40.209 What procedural problems do not result in the cancellation of a test and do not require correction?

* * * * *

32. Amend § 40.213 as follows:

a. Amend the introductory text of paragraph (c) by removing the words ''three consecutive error-free mock tests'' and adding in their place the words ''seven consecutive error-free mock tests (BATs) or five consecutive error-free tests (STTs)''.

b. Amend paragraph (e) by adding a sentence at the end of the paragraph, to read as follows:

§ 40.213 What training requirements must STTs and BATs meet?

* * * * *

(e) * * * If you are a BAT or STT who completed qualification training before January 1, 1998, you are not required to complete refresher training until January 1, 2003.

* * * * *

33. Amend § 40.225 as follows:

a. In paragraph (a), after the word ''test'' add the words ''beginning February 1, 2002''.

b. Revise paragraph (b)(4) to read as follows:

§ 40.225 What form is used for an alcohol test?

* * * * *

(b) * * *

(4) You may use an ATF in which all pages are printed on white paper. You may modify the ATF by using colored paper, or have clearly discernable borders or designation statements on Copy 2 and Copy 3. When colors are used, they must be green for Copy 2 and blue for Copy 3.

* * * * *

34. Amend § 40.229 by adding a new sentence after the first sentence to read as follows:

§ 40.229 What devices are used to conduct alcohol screening tests?

* * * You may use an ASD that is on the NHTSA CPL for DOT alcohol tests only if there are instructions for its use in this part. * * *

§ 40.253 [Amended]

35. Amend § 40.253(c) by removing the word ''sequential'' and adding in its place the word ''unique''.

36. Amend § 40.261 as follows:

a. Revise paragraphs (a)(1) through (a)(3).

b. In paragraph (a)(6), remove the words ''§ 40.241(b)(7));'' and add, in their place, the words ''§§ 40.241(g) and 40.251(d));''

The revisions read as follows:

§ 40.261 What is a refusal to take an alcohol test, and what are the consequences?

(a) * * *

(1) Fail to appear for any test (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA (see § 40.241(a));

(2) Fail to remain at the testing site until the testing process is complete; *Provided,* That an employee who leaves the testing site before the testing process commences (see § 40.243(a)) for a pre-employment test is not deemed to have refused to test;

(3) Fail to provide an adequate amount of saliva or breath for any alcohol test required by this part or DOT agency regulations; *Provided,* That an employee who does not provide an adequate amount of breath or saliva because he or she has left the testing site before the testing process commences (see § 40.243(a)) for a pre-employment test is not deemed to have refused to test;

* * * * *

37. Amend § 40.329 by revising paragraph (c) to read as follows:

§ 40.329 What information must laboratories, MROs, and other service agents release to employees?

* * * * *

(c) As a SAP, you must make available to an employee, on request, a copy of all SAP reports (see § 40.311). However, you must redact follow-up testing information from the report before providing it to the employee.

38. Amend § 40.331 by revising paragraphs (b)(2) and (c)(2), and adding new paragraphs (b)(3) and (c)(3), to read as follows:

§ 40.331 To what additional parties must employers and service agents release information?

* * * * *

(b) * * *

(2) All written, printed, and computer-based drug and alcohol program records and reports (including copies of name-specific records or reports), files, materials, data, documents/documentation, agreements, contracts, policies, and statements that are required by this part and DOT agency regulations. You must provide this information at your principal place of business in the time required by the DOT agency.

(3) All items in paragraph (b)(2) of this section must be easily accessible, legible, and provided in an organized manner. If electronic records do not meet these standards, they must be converted to printed documentation that meets these standards.

(c) * * *

(2) All written, printed, and computer-based drug and alcohol program records and reports (including copies of name-specific records or reports), files, materials, data, documents/documentation, agreements, contracts, policies, and statements that are required by this part and DOT agency regulations. You must provide this information at your principal place of business in the time required by the DOT agency.

(3) All items in paragraph (c)(2) of this section must be easily accessible, legible, and provided in an organized manner. If electronic records do not meet these standards, they must be converted to printed documentation that meets these standards.

* * * * *

39. Amend § 40.333 as follows:

a. In paragraphs (a)(1)(i) and (a)(1)(ii), remove the word ''employee''.

b. In paragraph (d), remove the word ''working'' and add in its place the word ''business''.

c. Add a new paragraph (e), to read as follows:

§ 40.333 What records must employers keep?

* * * * *

(e) If you store records electronically, where permitted by this part, you must ensure that the records are easily accessible, legible, and formatted and stored in an organized manner. If electronic records do not meet these criteria, you must convert them to printed documentation in a rapid and readily auditable manner, at the request of DOT agency personnel.

§ 40.349 [Amended]

40. Amend § 40.349(e) by adding the word ''business'' after the word ''two''.

41. Amend § 40.355 as follows:

a. Add a sentence at the end of paragraph (a).

b. In paragraph (j)(1), remove the words ''You are authorized by a DOT agency regulation to do so, you'' and add the word ''You'' in their place.

The addition reads as follows:

§ 40.355 What limitations apply to the activities of service agents?

* * * * *

(a) * * * No one may do so on behalf of a service agent.

* * * * *

§ 40.403 [Amended]

42. Amend § 40.403(a) by removing the word ''working'' and adding in its place the word ''business''.

43. Amend Appendix F to Part 40 by revising the list entitled ''Drug Testing Information, to read as follows:

Appendix F to Part 40—Drug and Alcohol Testing Information That C/TPAs May Transmit to Employers

* * * * *

Drug Testing Information

§ 40.25: Previous two years' test results
§ 40.35: Notice to collectors of contact information for DER
§ 40.61(a): Notification to DER that an employee is a ''no show'' for a drug test
§ 40.63(e): Notification to DER of a collection under direct observation
§ 40.65(b)(6) and (7) and (c)(2) and (3): Notification to DER of a refusal to provide a specimen or an insufficient specimen
§ 40.73(a)(9): Transmission of CCF copies to DER (However, MRO copy of CCF must be sent by collector directly to the MRO, not through the C/TPA.)
§ 40.111(a): Transmission of laboratory statistical report to employer
§ 40.127(f): Report of test results to DER
§§ 40.127(g), 40.129(d), 40.159(a)(4)(ii); 40.161(b): Reports to DER that test is cancelled
§ 40.129 (d): Report of test results to DER
§ 40.129(g)(1): Report to DER of confirmed positive test in stand-down situation
§§ 40.149(b): Report to DER of changed test result
§ 40.155(a): Report to DER of dilute specimen
§ 40.167(b) and (c): Reports of test results to DER
§ 40.187(a)–(f) Reports to DER concerning the reconfirmation of tests
§ 40.191(d): Notice to DER concerning refusals to test
§ 40.193(b)(3): Notification to DER of refusal in shy bladder situation
§ 40.193(b)(4): Notification to DER of insufficient specimen
§ 40.193(b)(5): Transmission of CCF copies to DER (not to MRO)
§ 40.199: Report to DER of cancelled test and direction to DER for additional collection
§ 40.201: Report to DER of cancelled test

* * * * *

[FR Doc. 01–19232 Filed 8–2–01; 4:41 p.m.]

BILLING CODE 4910–62–U

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

Federal Aviation Administration

14 CFR Part 121

Coast Guard

46 CFR Parts 4, 5, and 16

Research and Special Programs Administration

49 CFR Part 199

Federal Railroad Administration

49 CFR Part 219

Federal Motor Carrier Safety Administration

49 CFR Part 382

Federal Transit Administration

49 CFR Parts 653, 654, and 655

[Docket OST–99–6578]

RIN 2105–AD02, 2120–AH15, 2115–AG00, 2137–AD55, 2130–AB43, 2126–AA58, 2132–AA71

Transportation Workplace Drug and Alcohol Testing Programs: Response to Comments on Pre-Employment Inquiry Requirement; Common Preamble for DOT Agency Conforming Rules

AGENCY: Office of the Secretary, DOT.

SUMMARY: This document does two things. First, it responds to comments by maritime industry groups and others concerning the pre-employment inquiry provision of the Department-wide

regulations on transportation workplace drug and alcohol testing procedures (Part 40 rule). The Department recently opened a 30-day comment period on that issue. Second, this document serves as a ''common preamble'' discussing issues raised with respect to the Part 40 rule in comments to DOT agency proposals to amend their drug and alcohol testing rules to conform to the Part 40 rule.

ADDRESSES: The public may also review the docketed material referred to in this document electronically. The following web address provides instructions and access to the DOT electronic docket: *http://dms.dot.gov/search/.*

FOR FURTHER INFORMATION CONTACT: Kenneth C. Edgell, Acting Director, Office of Drug and Alcohol Policy and Compliance (ODAPC), 400 7th Street, SW., Room 10403, Washington, DC 20590, 202–366–3784 (voice), 202–366–3897 (fax), or *kenneth.edgell@ost.dot.gov* (e-mail); or Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, 400 7th Street, SW., Room 10424, Washington, DC 20590, 202–366–9306 (voice), 202–366–9313 (fax), or *bob.ashby@ost.dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

Comments on § 40.25

The Department included a provision (§ 40.25) in the final 49 CFR Part 40 rule that requires employers in all covered industries to seek information about the DOT-mandated drug and alcohol testing history of applicants for safety-sensitive work. We did so because it is very important, as a matter of safety, for employers to know whether new employees they are hiring have complied with drug and alcohol testing requirements, especially return-to-duty requirements (see 65 FR 79486; December 19, 2000). In the absence of this information, employers cannot know whether an individual is eligible, under DOT rules, to perform safety-sensitive functions. Employers cannot know whether they have an obligation to perform additional follow-up tests.

In industries that often have high employee turnover, such as some parts of the motor carrier and maritime industries, having this information is particularly important. If an employee tests positive for Employer A, quits or is fired, and then applies for work with Employer B, without having completed the mandatory return-to-duty process, Employer B could unknowingly allow the employee to perform safety-sensitive functions despite being prohibited from doing so by DOT rules. This is a situation in which ignorance, far from being bliss, becomes a threat to transportation safety. It also places Employer B in noncompliance with DOT rules.

Several months after the publication of the final rule, in June 2001, the Department received a letter from several maritime industry organizations objecting to the application of this requirement to the maritime industry. Because the text of § 40.25 had not been part of the December 1999 notice of proposed rulemaking for Part 40, the organizations requested a comment period on the section. While the Department believes that the adoption of this provision met all rulemaking process requirements, we decided, in the interest of responsiveness to the concerns of the maritime industry organizations, to open a 30-day comment period on the issue (66 FR 32248; June 14, 2001). By the July 16, 2001, comment closing date, we had received 48 comments on the section. This includes a number of comments to the Coast Guard's proposed conforming rule that also mentioned this issue, which we have added to this docket. All but four of these letters were from employers and other organizations in the maritime industry.

Generally, maritime industry commenters opposed the provision because, in their view, it created too heavy an administrative and cost burden for them. They said that the requirement was incompatible with the circumstances under which small maritime businesses operate. In particular, commenters said, their businesses have high employee turnover, and must often replace employees on very short notice. Commenters expressed the concern that the rule would delay hiring of workers while pre-employment inquiries were being made, resulting in vessels being shorthanded. In addition, some comments mentioned that they get employees through union hiring halls. If the hiring halls were unable to have performed the pre-employment inquiries on behalf of the employers, this would also lead to untenable delays in bringing new employees on board.

Fortunately, the Department's rule, as presently written, accommodates both these concerns. Section 40.25(c) provides that ''if feasible,'' the employer must obtain the information before the employee begins performance of safety-sensitive functions. If this is not feasible—as it may well not be in the rapid replacement scenario mentioned in comments—then the employer may use the employee for 30 days in safety-sensitive functions before obtaining either the information concerning the employee or documenting the employer's good faith effort to obtain it. This requirement does not, in any way, delay bringing new employees on board when needed, even in a situation where the employee must be used quickly.

One comment suggested that, even given this 30-day window, the provision could be troublesome if a company found out, 30 days after bringing an employee on board a vessel, that the individual was out of compliance and had to replace him or her. We suggest that it would be even more troublesome for the employer to learn this information and not replace such an individual. Deliberately avoiding steps that could bring this information to the attention of the employer would be irresponsible from a safety point of view.

The commenters' concerns about the role of hiring halls and other third parties involved in the drug and alcohol testing program (e.g., consortia and third party administrators (C/TPAs)) are also answered by the existing rule. Under the final Part 40 rule, C/TPAs are already permitted to perform the pre-employment inquiry function (see Appendix F). In the maritime and motor carrier industries, hiring halls already perform a number of drug and alcohol testing functions for employers (e.g., pre-employment testing). In the Department's view, hiring halls that perform drug and alcohol testing functions are properly viewed as C/TPAs. Consequently, if a hiring hall or other C/TPA has an arrangement that will ensure compliance with § 40.25, then it is consistent with Part 40 for the C/TPA or hiring hall to perform this function on behalf of the individual employers. In such a situation, the third party could make the inquiries and maintain the needed documentation, on which employers could rely when they obtain employees covered by the third party's § 40.25 program.

With respect to costs and administrative burdens, some comments asserted that the Department had failed to analyze the cost or paperwork burdens of the pre-employment inquiry requirement. This assertion is incorrect. The Department's Paperwork Reduction Act analysis of the December 2000 final rule, which the Office of Management and Budget approved and which we have placed in the docket for the public's information, specifically considered the costs and paperwork provisions of applying this provision to all covered transportation industries. (Previously, this requirement had applied only in the motor carrier industry.) The cost and burden information pertaining to the maritime

industry is the following: An estimated 69,600 new employees each year would be subject to the pre-employment inquiry requirement. This figure is derived from Coast Guard data about the employment practices of the maritime industry, and includes both licensed and unlicensed personnel. Given this number of employees that would be subject in a year, the Department calculated that the combined paperwork burden for new employers and previous employers in the maritime industry would be 12,821 annual burden hours. Using guidelines developed by the Association of Records Managers and Administrators and employee compensation hourly costs developed by the Department of Labor's Bureau of Labor Statistics, this would lead to an added annual cost of $256,430 to the maritime industry.

These costs and burdens are not, in the Department's view, unreasonably high. Even if the cost of implementing the provision were a number of times higher than this estimate, it would still be within reasonable bounds. The motor carrier industry, like the maritime industry, has many small businesses and high employee turnover, and it has implemented this provision for a number of years without suffering the dire consequences envisioned in some maritime industry comments.

Many comments made general assertions that the costs and burdens of carrying out § 40.25 would be too high. For the most part, however, commenters did not provide data from which either they or the Department could quantify this asserted burden. Two comments made high estimates of the costs of the provision based on numbers apparently reflecting costs of background checks performed by professional background check companies. Section 40.25 requires neither ''background checks'' nor the services of such companies. It simply requires employers to seek information about previous DOT drug and alcohol test results.

Two comments asserted that the provision should not be adopted because the motor carrier industry has not fully complied with the similar FMCSA provision. In the large, diverse industries that the Department regulates for safety, there is doubtless less than perfect compliance with this and other regulatory requirements. That is why FMCSA, the Coast Guard, and other DOT agencies have inspectors who check to see if employers are meeting their obligations. The potential for some noncompliance does not invalidate the rationale for a requirement, however.

Commenters also suggested that the Coast Guard could develop a system for responding to inquiries about previous positive tests, based on test result information required to be submitted to the Coast Guard. The decision on whether it would be feasible to develop such a system rests with the Coast Guard. However, the Department does not regard it as essential for the Coast Guard to have such a system now, or in the future, in order for § 40.25 to apply to the maritime industry.

Some industry comments argued that the pre-employment inquiries requirement is illegal, a violation of the Americans with Disabilities Act (ADA), unconstitutional, discriminatory (because it seeks information only abut prior DOT-mandated drug and alcohol tests), or a draconian invasion of privacy. We would point out that inquiries under this provision are made only on the basis of the employee's written consent, which goes far to obviate privacy concerns. Obtaining employees' consent to gather information about whether employees have complied with DOT safety rules in no way violates the ADA. In its comment, the Equal Employment Opportunity Commission, the Federal agency charged with implementing the ADA in employment matters, agrees that the provision is consistent with the ADA.

Only DOT drug and alcohol tests have consequences for regulated employers (such as the required completion of the return-to-duty process before further performance of safety-sensitive functions); it is, therefore, rational to request only information concerning these tests. To the best of the Department's knowledge, this provision has never been legally challenged in the several years it has applied to the motor carrier industry, including on the ground that the consequence of an employee's decision to decline to provide consent to the inquiry is the employer's inability to use the employee for safety-sensitive functions.

One commenter said that it should be sufficient to have a new hire pass a pre-employment test and expressed doubt about the value of the return-to-duty process. The Department is convinced of the safety necessity of a strong return-to-duty process, including evaluation by a substance abuse professional (SAP), education or treatment, reevaluation by the SAP, a return-to-duty test, and follow-up tests. Permitting an employee to test positive one day, ignore return-to-duty requirements, apply for a job with another company the next day, and pass a pre-employment test the day after and start work in a safety-sensitive position, undermines not only the Department's drug testing program but, more importantly, transportation safety. It is for these safety reasons—and not, as some comments asserted, a mere desire for uniformity among transportation industries—that the Department views the pre-employment inquiry requirement as vital.

For these reasons, the Department concludes that the comments on this provision do not justify any change in § 40.25, which will go into effect as scheduled for all the transportation industries. We would also point out that we received a few comments from non-maritime industry sources that supported the provision and suggested that the cost impacts were minimal.

''Common Preamble'': Comments to DOT Agency Conforming Rules

At the time the Department's agencies published their proposals to make their rules consistent with the new Part 40, the Department published a common preamble discussing certain common issues (66 FR 21492, April 30, 2001). For the most part, the individual DOT agency preambles to their final ''conforming rules'' address the issues mentioned in this common preamble. However, comments to operating administration dockets raised some issues that cut across DOT agency lines or are otherwise pertinent to Part 40 itself. The Department is responding to these comments in this portion of the preamble.

The Department had hoped to publish the six conforming rules together, on or before August 1, 2001. However, some of the operating administration rules remain in the final stages of coordination. We expect to publish them very shortly. However, with respect to any of DOT agencies whose rules have not been published by this date, the Department intends that new Part 40 control in the event of any inconsistency between Part 40 and the unmodified DOT agency rules during the brief time between August 1 and the effective dates of the amended DOT agency rules.

One testing industry association requested that each of the six DOT agency regulations authorize service agents to make refusal determinations when owner-operators fail to appear for a test (see § 40.355(j)(1)). The Department believes it is reasonable for service agents to make refusal determinations in this instance. For simplicity's sake, we are amending Part 40 to make this change, rather than amending six modal regulations. The amendment (published with the Department's technical amendments to Part 40) will remove the language making authorization by a DOT agency

regulation a prerequisite to a service agent's refusal determination in this case. This means that § 40.355(j)(1) will authorize service agents to make refusal determinations with respect to owner-operators and other self-employed individuals when the service agent has scheduled the test and the individual fails to appear for it without a legitimate reason.

This commenter also asked that all DOT agencies require violations of DOT agency drug and alcohol testing rules to be reported to the DOT agency in question. While this may be feasible for some modes (e.g., the Coast Guard, which has adopted such a provision), it may be more difficult for others (e.g., FMCSA, given the very large size of the industry and work force involved). The Department is not adopting an across-the-board response to this comment, but individual operating administrations will continue to consider if and when it is appropriate to adopt such a requirement.

This commenter also suggested that where the same individual acts as both an medical review officer (MRO) and substance abuse professional (SAP), he or she meet the training requirements for both professions. This is, indeed, the effect of the training requirements in the revised Part 40, and no regulatory change is needed on this point.

The same commenter also recommended that all DOT agency rules require proof of having met pre-employment testing requirements before an individual is enrolled in a random testing program. The mandate of DOT rules is that someone meet applicable pre-employment testing requirements before he or she begins performing safety-sensitive functions. As long as employers meet this requirement, the Department's safety objectives for pre-employment testing have been met. An employer does not violate our rules if an employee is part of a random testing pool without proof of having complied with pre-employment requirements, as long as the employee does not perform safety-sensitive functions without having complied. Of course, employers must be able to document that employees whom they use for safety-sensitive functions in fact have met applicable pre-employment testing requirements. We do not believe that any further across-the-board action is needed in this area at this time.

Many of the same maritime industry commenters who objected to § 40.25 in their comments to the Coast Guard NPRM also objected to the collector training requirements of § 40.33. As noted, these comments have been placed in the Department's Part 40 docket. Generally, they said that the requirements were too burdensome and costly for the maritime industry, especially small employers. Unlike § 40.25, however, these training requirements of Part 40 were not the subject of a comment period at this time. Many commenters did speak to these provisions in response to the Department's December 1999 Part 40 NPRM, and the Department responded to these comments in the December 2000 final rule. The Department is not considering further changes to § 40.33 at present. Indeed, we believe that, in the maritime industry, as elsewhere, well-trained collectors are essential for the operation of a fair and accurate drug testing program, which in turn is a key part of the Department's safety efforts.

Old Part 40 required that a laboratory must have qualified personnel available to testify in an administrative or disciplinary proceeding based on a positive test of the employee's specimen [see former § 40.29(n)(6)]. The Department never interpreted this provision as permitting a party to a proceeding to require the personal attendance at a hearing of one or more laboratory personnel or that the laboratory or employer must pay for the time or transportation of laboratory personnel involved in proceedings.

When the Department revised Part 40, we deleted this provision, in the belief that the discovery process in administrative and judicial proceedings was sufficient to obtain all needed relevant testimony. One comment from a union docket raised the issue of this deletion, advocating that the deleted language should be put back into the rule and that laboratories and employers should have to produce and pay for laboratory witnesses in proceedings. A comment from another union raised a broader, but related, issue. It said that, based on experience gained in litigation concerning errors in the validity testing process at one laboratory, it believed that employees should always have access to all relevant documentation about laboratory procedures. According to the comment,

> Such relevant evidence includes but is not limited to: Laboratory quality control records, laboratory performance records on proficiency testing, results of laboratory inspections and critiques, all laboratory internal and external quality control data, instrument maintenance and corrective action documentation, instrument and software instruction manuals, as well as laboratory Standard Operating Procedures.

The commenter stressed that this information should be available to all employees subject to testing under DOT regulations, regardless of whether the employee had access to specific administrative adjudication proceedings (e.g., grievance procedures, certificate actions). The commenter believes that at least some of this information should be made available to unions as organizations, as distinct from individual employees.

As noted above, many employees have access to discovery proceedings, through which they can gain access to a wide variety of information. As the union making the comment noted, it had conducted extensive discovery in one prominent substitution case. Nothing in the Department's rules protects laboratory data from such discovery. Even where administrative proceedings like FAA certificate actions or FRA locomotive engineer proceedings are not involved in a case, individuals who file cases in state or Federal court also have access to discovery. However, where an employee may not have ready access to discovery rules, access to potentially relevant laboratory data does potentially raise issues of fairness.

Compiling and copying the often voluminous information involved (which in some cases can run into thousands of pages) can be a significant cost and administrative burden. It could also be burdensome for laboratory personnel to be compelled to give testimony in a wide variety of proceedings. Who should bear these costs and burdens (e.g., the requester, as is common in Federal freedom of information actions)? Laboratories may regard some of this information as proprietary business information (e.g., portions of Standard Operating Procedures). In the absence of a court or administrative decisionmaker (as is involved in a discovery proceeding), who determines the scope of relevance for the requested information or testimony, and by what standards?

The Department would have to consider these and other matters before deciding on the shape of a regulatory requirement of the kind the commenters requested. We believe that, if we propose provisions of the kind requested by the commenter, they would properly reside in Part 40, rather than in the DOT agency regulations. In the near future, we anticipate publishing a document requesting further comment on these issues.

Issued this 24th day of July, 2001, at Washington, DC.

Norman Y. Mineta,

Secretary of Transportation.

[FR Doc. 01–19230 Filed 8–2–01; 4:41 pm]

BILLING CODE 4910–62–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 121

[Docket No. FAA–2000–8431; Amendment No. 121–285]

RIN 2120–AH15

Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The Federal Aviation Administration (FAA) is revising its drug and alcohol regulations. This final rule incorporates changes in the Department of Transportation (DOT) final rule, ''Procedures for Transportation Workplace Drug and Alcohol Testing Programs,'' published December 19, 2000. In addition, this rule changes the drug testing program and alcohol misuse prevention program regulations in light of the amendments that have been made to the medical standards and certification requirements. Certain requirements under reasonable suspicion and post-accident alcohol testing have been eliminated because these requirements are outdated and no longer valid. Finally, this rule eliminates the approval process for consortia to be consistent with the other DOT Modal Administrations and the DOT Procedures for Transportation Workplace Drug and Alcohol Testing Programs. The effect of these changes is to update and clarify the regulations based on DOT's revisions and previous FAA rulemakings.

DATES: This final rule is effective August 1, 2001.

FOR FURTHER INFORMATION CONTACT: Diane J. Wood, Manager, Drug Abatement Division, AAM–800, Office of Aviation Medicine, Federal Aviation Administration, Washington, DC 20591, telephone number (202) 267–8442.

SUPPLEMENTARY INFORMATION:

Availability of Rulemaking Documents

You can get an electronic copy using the Internet by taking the following steps:

(1) Go to the search function of the Department of Transportation's electronic Docket Management System (DMS) web page (http://dms.dot.gov/search).

(2) On the search page type in the last four digits of the Docket number shown at the beginning of this notice. Click on ''search.''

(3) On the next page, which contains the Docket summary information for the Docket you selected, click on the document number for the item you wish to view.

You can also get an electronic copy using the Internet through the Office of Rulemaking's web page at http://www.faa.gov/avr/armhome.htm/nprm/nprm.htm or the Government Printing Office's web page at http://www.access.gpo.gov/su_docs/aces/aces140.html.

You can also get a copy by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the amendment number or docket number of this rulemaking.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. Therefore, any small entity that has a question regarding this document may contact their local FAA official, or the person listed under **FOR FURTHER INFORMATION CONTACT.** You can find out more about SBREFA on the Internet at our site, http://www.faa.gov/avr/arm/sbrefa.htm. For more information on SBREFA, e-mail us at 9–AWA–SBREFA@faa.gov.

Background

General

On April 29, 1996, the Department of Transportation (DOT) published an advance notice of proposed rulemaking (ANPRM) (61 FR 18713) asking for suggestions to change 49 CFR part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs. Subsequently, on December 9, 1999, a notice of proposed rulemaking (NPRM) (64 FR 69076) was published proposing a comprehensive revision to 49 CFR part 40. The DOT published its final rule on December 19, 2000 (65 FR 79462). As a consequence of the DOT's final rule, on April 30, 2001, the FAA published an NPRM (66 FR 21494) proposing to revise its drug and alcohol testing regulations to integrate, as appropriate, the new DOT procedures. Also to conform with the DOT procedures and the practices of the other DOT Modal Administrations, the FAA proposed elimination of its approval of consortia.

In addition, on March 19, 1996, the FAA published a final rule, Revision of Airman's Medical Standards and Certification Procedures and Duration of Medical Certificates (54 FR 11238). This final rule amended requirements for 14 CFR part 67 medical certificate holders. Since the publication of the 14 CFR part 67 final rule, the FAA has identified some inconsistencies between 14 CFR part 121 and 14 CFR part 67 that require modification. In revising 14 CFR part 121 in response to the DOT final rule, the FAA was revising the same sections affected by the 14 CFR part 67 final rule changes. Therefore, rather than reissuing inconsistent provisions, the FAA has taken this opportunity to address these inconsistencies. Also, two sections of 14 CFR part 121, appendix J, refer to a requirement for employers to submit information to the FAA on March 15, 1996, 1997, and 1998. Specifically, 14 CFR part 121, appendix J, sections III.B.2(b) and III.D.4(b) require employers to submit to the FAA notice of any post-accident test or reasonable suspicion test that was not completed within the eight hour period required for such tests. The reporting requirements were imposed only for the first three years after the final rule on alcohol misuse prevention became effective. Those requirements have expired, and therefore have been removed.

Consortia

In Notice No. 00–14, the FAA proposed eliminating consortia ''approvals.'' We received three comments on the consortium issue. For more information on the comments received, see ''Discussion of Comments'' below.

The FAA has eliminated consortia ''approvals.'' The FAA has been the only DOT Modal Administration that has issued ''approvals'' to consortia. In light of the changes to 49 CFR part 40 and in recognition of the practices of the other DOT Modal Administrations, the FAA will no longer ''approve'' consortia, and it will not review consortium plans submitted. There will no longer be any ''FAA-approved'' consortia. All FAA approvals are rescinded by this final rule. Therefore, no entity can hold itself out as ''FAA-approved'' after the effective date of this final rule.

In the past, only FAA-approved consortia could combine the employee random testing pools of different employers. Now, that benefit is conferred to all Consortia/Third-party administrators (C/TPA). We have

replaced ''consortium'' with C/TPA as appropriate throughout appendices I and J.

DOT Discussion of Intermodal Issues

In a document published concurrently with this final rule, the DOT discusses intermodal issues concerning all of the modal final rules amending the drug and alcohol testing rules.

Discussion of Comments

General Overview

The comment period for the NPRM closed June 14, 2001. The FAA received four comments in response to the NPRM before the comment period closed. One comment was a joint filing of the Air Line Pilots Association (ALPA) and Transportation Trades Department (TTD), AFL-CIO. Two comments were from FAA-approved consortia. One comment was from the Drug and Alcohol Testing Industry Association (DATIA).

One of the commenters requested clarification regarding operators as defined by 14 CFR 135.1(c). This issue is outside the scope of this rulemaking and will not be addressed on its merits at this time.

In its comment, DATIA proposes that the FAA require managers of random testing pools, including C/TPAs and MROs, to receive written proof of an individual's pre-employment result before putting that individual into a random testing pool. Also, DATIA proposes that the FAA require that the MRO or C/TPA report a positive test result concurrently to the FAA in writing, whenever an employer is notified that test result is positive. These changes proposed in DATIA's comments are outside the scope of what was proposed in Notice No. 00–14. Therefore, the FAA will not consider these recommendations on their merits at this time.

The ALPA and TTD comment and the DATIA comment both focus on some issues from 49 CFR part 40, which were outside the scope of the FAA's rulemaking. We have forwarded these comments to the DOT for consideration in future revisions to 49 CFR part 40.

In addition, two commenters requested guidance on the interface between the requirements of the FAA's regulations and 49 CFR part 40. The FAA intends to conduct industry training in the future to address such issues.

For ease and clarity, we have categorized the comment discussion by rule section.

Appendix I

I. General

In Notice No. 00–14, the FAA proposed revising section I and renaming it ''General.'' Also, the FAA proposed adding paragraph A. ''Purpose'' to section I for clarity and organizational purposes. We proposed moving and revising the language in the existing section I into a new paragraph B. ''DOT Procedures'' and adding paragraph C. ''Employer Responsibility.'' These changes are necessary to clarify the responsibility of employers to follow the requirements and procedures of this appendix and 49 CFR part 40. These changes also reinforce that employers are responsible for all actions of their officials, representatives, and service agents in carrying out the requirements of 14 CFR part 121, appendix I and 49 CFR part 40.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed, with minor editorial changes.

II. Definitions

Notice No. 00–14 proposed to change the definition of ''prohibited drug'' to limit the definition to the five drugs that are prohibited under 49 CFR 40.85. The current language in 14 CFR part 121, appendix I, could be misread to mean that the use of certain prohibited drugs is permitted if authorized under state law (such as medical use of marijuana that may be recommended or prescribed by physicians in certain states that have legalized its use for the treatment of some conditions). We expect that the changes will eliminate any such confusion.

We also proposed changing the definition of ''refusal to submit'' to refer to 49 CFR part 40. This is a clarifying change.

In addition, Notice No. 00–14 proposed changing the definitions of ''verified negative test result'' and ''verified positive test result.'' These definitions are necessary because these terms are used in this appendix. The definitions are consistent with the broader language for verified tests used in 49 CFR 40.3.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed, with minor editorial changes.

IV. Substances for Which Testing Must Be Conducted

Notice No. 00–14 proposed to eliminate the second sentence of this section that allowed the employer to test for drugs in addition to those specified in 14 CFR part 121, appendix I, with approval of the FAA under 49 CFR part 40 and for substances for which the Department of Health and Human Services has established an approved testing protocol. This action is necessary because 49 CFR 40.85 prohibits testing for additional drugs.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed.

V. Types of Drug Testing

C. Random Testing. In Notice No. 00–14, we proposed changing all sections referring to FAA-approved consortia. We received one comment on the issue of renaming ''consortium'' to ''C/TPA.'' The commenter supports the proposal.

Therefore, in this section, we revised the language to permit Consortia/Third-party administrators (C/TPA) to combine the employee random testing pools of different employers. In the past, only FAA-approved consortia could combine the employee random testing pools of different employers. This change conforms to 49 CFR part 40.

F. Return to Duty Testing. In Notice No. 00–14, we proposed changing the requirements of return to duty testing to conform with 49 CFR part 40. We also proposed clarifying that an employee must undergo a return to duty drug test before resuming the performance of a safety-sensitive function. In accordance with 49 CFR part 40, we proposed requiring that the test not occur until the Substance Abuse Professional (SAP) not the Medical Review Officer (MRO), has determined that the employee has successfully complied with the prescribed education and/or treatment.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed, with minor editorial changes.

G. Follow-up Testing. In Notice No. 00–14, we proposed changing the requirements of follow-up testing to conform with 49 CFR part 40, which requires the SAP, instead of the MRO, to determine the number of follow-up tests an employee should have. We also proposed to change language to conform with the 49 CFR part 40 requirement that an employee who tests positive is subject to at least six follow-up tests after returning to duty. Furthermore, we proposed to clarify that the alcohol test permitted under paragraph 3 needs to be performed in accordance with 14 CFR part 121, appendix J.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed, with minor editorial changes.

VI. Administrative and Other Matters

Notice No. 00–14 proposed to refer to 49 CFR part 40 for documents that an employer must maintain. We preserved the requirement for FAA-specific documents already in 14 CFR part 121, appendix I, that were not referenced into 49 CFR part 40. In particular, we proposed deleting current paragraphs A. and B. titled ''Collection, Testing, and Rehabilitation Records'' and ''Laboratory Inspections'' respectively because these requirements are now addressed in 49 CFR part 40. We also proposed eliminating parts of paragraph C. ''Employee Request for Test of a Split Specimen'' because 49 CFR part 40 sets out these requirements for split specimens. We proposed moving current paragraph C.3. to the new MRO section, 14 CFR part 121, appendix I, section VII.A., because it is an MRO responsibility.

In Notice No. 00–14, we proposed to add a new paragraph A. ''MRO Record Retention Requirements.'' Specifically, we consolidated language concerning MRO contracting services and transfer of records from current section VII.C. because these records were not included in 49 CFR part 40. These are not new record retention requirements. In the proposal, we inadvertently omitted some language that appeared in current section VII.C. when we transferred the language to paragraph A. We have restored the original language in this final rule.

We proposed to add a new paragraph B. ''Access to Records.'' These requirements are currently in section VII.C.4 and are being moved to consolidate the record requirements into one section.

The FAA did not receive any comments on the proposed changes described above, which are adopted as proposed, with minor editorial changes.

In Notice No. 00–14, we proposed to add a new paragraph C. ''Service Agent.'' One commenter raises questions about the timeframes specified in this provision. We reconsidered paragraph C. and determined that the provisions in 49 CFR 40.333(d) and 40.349(e) are sufficient. Therefore, we are eliminating proposed paragraph C from the final rule.

Also, we proposed to revise paragraph D. ''Release of Drug Testing Information.'' This change conforms to 49 CFR part 40. Because we are deleting proposed paragraph C., proposed paragraph D. is now relettered as paragraph C. We received one comment from ALPA and TTD on this paragraph. The comment states that we should not delete this provision. The FAA has reviewed the proposal and determined that this provision was not deleted in appendix I. However, the commenter was correct in pointing out that this provision was omitted from appendix J in the NPRM, and we have made the appropriate corrections in appendix J. For a further discussion of the issue see appendix J, section IV.C.2.

In addition, one comment was received regarding the requirement in paragraph A. for MROs to transfer records to a new MRO within 10 days of the employer's notification that a new MRO has been hired. The commenter states that 30 days would be a more appropriate timeframe.

In the future, the FAA may consider the expanded timeframe that the commenter suggests. However, the FAA is not making the suggested change at this time because it is outside the scope of this rulemaking and notice and opportunity for public comment have not been provided for changing the existing 10-day requirement. Instead, we are moving the language from paragraph VII.C. to paragraph A. as proposed.

Furthermore, Notice No. 00–14 proposed to change ''consortium'' to ''C/TPA,'' as appropriate. We received one comment on this issue, which supports the change. Therefore, the FAA revised paragraph A.3 to use the term ''C/TPA.''

VII. Medical Review Officer, Substance Abuse Professional, and Employer Responsibilities

In Notice No. 00–14, we proposed renaming this section from ''MRO and Substance Abuse Professional'' to ''Medical Review Officer, Substance Abuse Professional, and Employer Responsibilities.'' We also proposed renaming paragraph A. from ''MRO and Substance Abuse Professional Duties'' to ''Medical Review Officer'' and renaming paragraph B. from ''MRO Determinations'' to ''Substance Abuse Professional.'' These changes will better organize the information and conform to changes to 49 CFR part 40.

We proposed to delete the majority of MRO and SAP responsibilities in this appendix and instead refer the reader to 49 CFR part 40. Specifically, in Notice No. 00–14, we proposed: (1) Retaining the MRO and employer responsibilities for 14 CFR part 67 airman medical certificate holders because these requirements are specific to the FAA; (2) moving some responsibilities from the MRO to the SAP because 49 CFR part 40 has given SAPs return to work duties that formerly belonged to the MROs; (3) moving the provision from section VI.C.3 that prohibits the MRO from delaying the verification of the primary test result pending the outcome of the split-specimen test; (4) combining the MRO, SAP, and Employer Responsibilities regarding 14 CFR part 67 airman certificate holders under paragraph C. ''Additional Medical Review Officer, Substance Abuse Professional, and Employer Responsibilities Regarding 14 CFR part 67 Airman Medical Certificate Holders.''

Notice No. 00–14 proposed to change paragraph B. ''MRO Determinations'' to reflect the 1996 final rule that amended 14 CFR part 67. Prior to the 1996 final rule, the MRO was required to evaluate whether a 14 CFR part 67 airman medical certificate holder was dependent on drugs following a verified positive drug test result. Since the 1996 final rule, MROs have not been permitted to ''make a determination of probable drug dependence or nondependence as specified in 14 CFR part 67.'' Therefore, in Notice No. 00–14 we proposed to: (1) Delete any reference to the MRO determining dependency for a person holding an FAA medical certificate; (2) require the employer, and not the MRO, to forward the SAP evaluation to the Federal Air Surgeon.

In Notice No. 00–14, we proposed to revise paragraph C.2 to restrict the SAP's ability to return a 14 CFR part 67 medical certificate holder to a safety-sensitive function if that medical certificate is necessary for the performance of the safety-sensitive function. Currently, the ability of the MRO to return an individual to duty is restricted if that individual is a 14 CFR part 67 medical certificate holder. Because the changes to 49 CFR part 40 gave the SAP the return to duty role, paragraph C.2 was revised accordingly.

If an individual is not required to hold a 14 CFR part 67 medical certificate to perform safety-sensitive functions, the SAP may return the individual to duty. Although the individual's medical certificate is subject to review by the Federal Air Surgeon, this review will not affect the SAP's ability to return the individual to duty as long as the individual did not need a medical certificate to perform his/her duties. For example, a flight attendant may hold a medical certificate because he or she is also a private pilot. In such a case, the person's positive test result would be reported to the Federal Air Surgeon, but the SAP could recommend that the individual return to duty as a flight attendant. The Federal Air Surgeon would act independently on the medical certificate. The Federal Air Surgeon's actions on the flight attendant's medical certificate would

have no bearing on his or her ability to return to work as a flight attendant.

One minor change was made to the proposed language for this section. The minor change adds the option for the Federal Air Surgeon to issue a medical certificate without a ''special issuance'' stipulation on the certificate. The reason for this is so that, in rare circumstances, the Federal Air Surgeon could determine that a ''special issuance'' is not necessary. Without the change to the rule language, a person granted a medical certificate without a ''special issuance'' could not return to work.

The FAA received one comment from the ALPA and TTD on the proposed changes regarding 14 CFR part 67. The comment supports the proposed revisions and clarifications that make the drug testing and alcohol misuse prevention regulations consistent with the prior changes to 14 CFR part 67. Therefore, the changes are adopted as proposed, with minor editorial changes.

Additionally, in Notice No. 00–14, the FAA requested comment on whether the requirements to follow both 14 CFR part 67 and 49 CFR part 40 should be made explicit for clarity purposes, or whether the concepts are clear enough as implied by 49 CFR part 40 and this appendix. Specifically, we discussed that the employer must ensure the employee who is required to hold a medical certificate meets the return to duty and follow-up testing requirements in accordance with 49 CFR part 40, after the Federal Air Surgeon has recommended that such an employee be permitted to perform safety-sensitive duties. The FAA did not propose specific language in appendix I, however, we proposed clarifying language on this issue in 14 CFR 121, appendix J, section V.C.5.

One commenter states that the SAP's duties are clear with respect to 14 CFR part 67; another commenter states that the FAA should clarify this issue. The FAA has determined that the provision merits clarification. Therefore, the FAA has adopted the language proposed to 14 CFR 121, appendix J, section V.C.5 and inserted it into 14 CFR part 121, appendix I, section VII.C.4.

IX. Employer's Antidrug Program

Notice No. 00–14 proposed to eliminate the requirement for an entity seeking to operate as a consortium to first seek the approval of the FAA because, as noted in the common preamble to the NPRM, the terms upon which the FAA granted its approval to consortia have now been changed by the requirements of 49 CFR part 40.

The FAA received three comments on the C/TPA issue. DATIA supports the elimination of FAA's approval of consortia, saying that removal of the FAA approval process will emphasize that C/TPA operations are regulated by 49 CFR part 40 and will promote continuity of services by C/TPAs. Two of the commenters do not favor the elimination of FAA approval for consortia because they believe that such elimination may result in additional confusion and exposure to less than competent service providers for aviation employers. One commenter states that FAA-approved consortia are needed because many aviation employers do not have the knowledge, time, and personnel required to understand and implement an effective drug and alcohol testing program. Furthermore, two commenters believe that FAA-approved consortia fill a critical void. Moreover, one commenter favors extending approval beyond consortia to third party administrators throughout DOT modal administrations.

The FAA disagrees with the comments opposing the elimination of the FAA approval process because experience has shown that some consortia and employers have misunderstood the term ''FAA-approved consortium'' as meaning that the consortium operates in accordance with the appropriate regulations. In fact, FAA ''approval'' of a consortium has never been a measure of the consortium's actual ability or compliance. Employers have always been and will remain responsible for ensuring that their testing programs are in compliance with the regulations. Since this misunderstanding of the term ''approval'' has contributed to significant violations of the regulations, removing ''approval'' for consortia makes that point clear.

Therefore, paragraph A.4 has been revised to eliminate the requirement for a consortium to apply for the FAA's approval. Paragraph A.6 has been revised to eliminate the word ''consortium'' to conform to 49 CFR part 40. Also, since consortium approvals have been eliminated within this appendix, all references to an ''FAA-approved consortium'' or ''consortium'' have been replaced with ''C/TPA'' as defined by 49 CFR part 40.

One commenter inquires about the administrative processes that will be applied if the proposed changes to eliminate FAA-approved consortia are adopted. Specifically, the commenter asks what the ramifications of the proposed change to the employer's policy and program will be.

First, employers can continue to contract with consortia and third party administrators as they always have. The employer's FAA-approved plan has always been signed and certified by the employer, regardless of the employer's membership in a consortium. C/TPAs may continue to prepare and forward the employer's plan submissions to the FAA, as long as the employer signs and certifies the document. Second, it will not be necessary for employers who are consortium members to resubmit their plans. The consortium antidrug plan format, ''CONSORTIUM MEMBER ANTIDRUG PLAN/AMPP CERTIFICATION STATEMENT,'' is substantively the same as the individual antidrug plan format, ''ANTIDRUG PLAN/ALCOHOL MISUSE PREVENTATION PROGRAM CERTIFICATION STATEMENT.'' Since both formats are substantively the same, previously submitted consortium member plans will be treated as independent plans. Third, at this time we are not eliminating the requirement for aviation employers to file and receive approval of drug and alcohol program plans.

After consideration of the comments discussed above, we are eliminating the ''FAA approval'' of consortia as discussed in the NPRM.

X. Reporting of Antidrug Program Results

In Notice No. 00–14 we proposed changing the term ''FAA-approved consortia'' to ''C/TPA.'' We received one comment on this issue, which supported the change. Therefore, in the final rule we have revised paragraph F to permit C/TPAs to prepare reports on behalf of individual employers, whereas only FAA-approved consortia were permitted to do this in the past.

An additional minor change is being made to this paragraph to clarify that C/TPAs are not permitted to sign the annual antidrug program results reports for the employer. This minor change is necessary because an FAA-approved consortium was not permitted to sign its client's annual antidrug program results report in the past, therefore, we are clarifying that the same restriction applies to C/TPAs.

XII. Testing Outside the Territory of the United States

In Notice No. 00–14, the FAA proposed changing the title of this section from ''Employees Located Outside the Territory of the United States'' to ''Testing Outside the Territory of the United States.'' While 49 CFR part 40 authorizes laboratory and MRO functions to occur outside the United States in Canada and Mexico, we proposed clarifying that this authorization does not apply to entities

regulated by this appendix. We proposed changing paragraph A. to explicitly state that no part of the testing process, including specimen collection, laboratory processing, and MRO actions, shall be conducted outside the territory of the United States.

It is important to note that, unlike DOT agencies that require drug testing by entities outside the United States, the FAA's regulations apply only to United States' entities and testing is confined to the soil of the United States and its territories. The FAA has consistently declined to take a unilateral approach to testing outside the United States, and instead has been working productively with the International Civil Aviation Organization (ICAO) to develop a multilateral approach to drug and alcohol testing consistent with the Chicago Convention. The FAA's efforts through ICAO have been successful in the past, and we are continuing to work with ICAO in supporting an aviation environment free of substance abuse. However, if the threat to aviation safety posed by substance abuse increases, or requires additional efforts and the international community has not adequately responded, the FAA will consider taking appropriate rulemaking action. The change conforms to past FAA guidance on this section, to past practice, and to our commitment to continue to work with ICAO to address all aspects of international substance abuse testing.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed.

XIII. Waivers from 49 CFR 40.21

As proposed in Notice No. 00–14, this new provision addresses waivers described in 49 CFR 40.21. Under 49 CFR 40.21, an employer is prohibited from temporarily removing an employee from the performance of safety-sensitive functions based only on a report from a laboratory to the MRO of a confirmed positive test for a drug or a drug metabolite, an adulterated test, or a substituted test before the MRO has completed verification of the test result. This practice is described in 49 CFR 40.21 as ''stand down.'' However, 49 CFR 40.21(b) permits an employer to seek a waiver from 49 CFR 40.21(a), thereby permitting the employer to stand down its employees.

In order to implement the waiver provision of 49 CFR 40.21, the FAA proposed adding a new section to this appendix. There has been no past practice of granting waivers to the FAA's drug testing regulations. Therefore, this provision will create a process to address requests for waivers from the stand down provisions of 49 CFR 40.21. Consistent with the requirements for seeking a waiver under 49 CFR 40.21(b), we proposed placing the responsibility on the applicant to provide sufficient factual information, analysis and justification to obtain a waiver from the stand down provision. The FAA is given discretion, by 49 CFR 40.21(b), to grant, deny, grant with conditions, modify, and revoke waivers. Because this is detailed in 49 CFR 40.21(b), the proposed language did not address the FAA's discretion on these matters.

The FAA will not consider the grant of such waivers lightly. There are strong privacy concerns that surround an unverified positive test result. Waiver applications must address all of the concerns detailed in 49 CFR 40.21(b) and must show that the individual's privacy concerns are being properly protected by the aviation entity. If a waiver application fails to address the criteria in 49 CFR 40.21(b), it is likely to be denied without detailed analysis. In addition, if the FAA grants a waiver, as stated in 49 CFR 40.21(d)(2), ''The Administrator, or his or her designee, may immediately suspend or revoke the waiver if he or she determines that you have failed to protect effectively the interests of employees in fairness and confidentiality, that you have failed to comply with the requirements of this section, or that you have failed to comply with any other conditions the DOT agency has attached to the waiver.''

The FAA did not receive any comments on the proposed changes, which are adopted as proposed.

Appendix J

I. General

In Notice No. 00–14, we proposed to add paragraph C. ''Employer Responsibility'' to ensure that employers understand that they are responsible for all applicable requirements and procedures of this appendix and 49 CFR part 40. This change also reinforces that employers are responsible for all actions of their officials, representatives, and service agents in carrying out the requirements of the DOT agency regulations.

In addition, we proposed to:

- Reletter paragraph C. ''Definitions'' to paragraph D. ''Definitions.''
- Delete the definition of ''Consortium'' because the definition is provided in 49 CFR part 40.
- Delete the definition of ''Confirmation Test'' because the definition is provided in 49 CFR part 40.
- Change the term from ''refuse to submit (to an alcohol test)'' to ''refusal to submit'', and change the definition to refer to 49 CFR part 40.261.
- Delete the definition of ''Screening Test'' since the definition is provided in 49 CFR part 40.
- Reletter the remaining paragraphs accordingly.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed, with minor editorial changes.

III. Tests Required

A. Pre-employment Testing. In order to standardize the pre-employment alcohol testing requirements, all of the Department of Transportation modal administrations proposed the same rule language. This was discussed in the Department of Transportation's common preamble published on April 30, 2001 (66 FR 21492). We proposed the standardized language in Notice No. 00–14, and we added the word ''testing'' to the heading of the section for consistency with the other paragraphs in this section.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed.

B. Post-accident Testing. In Notice No. 00–14, we proposed to eliminate paragraph 2(b), which required specific data to be submitted to the FAA by March 15, 1996, 1997, and 1998. The timeframes have expired and submission of the data is no longer required. Also, we proposed adding the word ''testing'' to the heading for consistency with the other paragraphs in this section.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed.

C. Random Testing. In Notice No. 00–14, we proposed changing all sections referring to FAA-approved consortia. We received one comment on the issue of renaming ''consortium'' to ''C/TPA.'' The commenter supports the proposal.

Therefore, we revised paragraph C. 6 to permit C/TPAs to combine the employee random testing pools of different employers. In the past, only FAA-approved consortia could combine the employee random testing pools of different employers. This change conforms to 49 CFR part 40.

D. Reasonable Suspicion Testing. We proposed eliminating paragraph 4(b), which required specific data to be submitted to the FAA by March 15, 1996, 1997, and 1998. The timeframes have expired and submission of the data is no longer required. Also, we proposed eliminating in paragraph 4(c) (formerly 4(d) in the current rule) the words ''Except as provided in paragraph (b)'' since paragraph (b) has been eliminated.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed.

E. Return to Duty Testing. We proposed changing the requirements of return to duty testing to conform with 49 CFR part 40, which now requires the SAP to determine that the employee has successfully complied with the prescribed education and/or treatment prior to allowing the person to perform safety-sensitive functions.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed, with minor editorial changes.

F. Follow-up Testing. We proposed changing the requirements of follow-up testing to conform with 49 CFR part 40, which now requires the SAP to determine the number of follow-up tests for an employee and to ensure that any employee who receives an alcohol violation is subject to at least six follow-up tests after returning to duty. In addition, we proposed revising this paragraph for clarity.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed, with minor editorial changes.

IV. Handling of Test Results, Record Retention and Confidentiality

A. Retention of Records. In Notice No. 00–14, the FAA proposed to specify which records employers must continue to retain in addition to the records required by 49 CFR part 40. Specifically, we eliminated the reference to recordkeeping requirements, except annual reports submitted to the FAA, because these recordkeeping requirements are included in 49 CFR part 40. For clarity, we moved all existing record requirements throughout paragraphs 2 and 3 into the appropriate sections of paragraph 2 and noted the specific retention period for the records. We eliminated paragraph 2(c) because all of the 1-year requirements are included in 49 CFR part 40.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed.

B. Reporting of Results in a Management Information System. In Notice No. 00–14 we proposed changing the term ''FAA-approved consortia'' to ''C/TPA.'' We received one comment on this issue, which supported the change. Therefore, in the final rule we have revised paragraph B.8 to permit C/TPAs to prepare reports on behalf of individual employers, whereas only FAA-approved consortia were permitted to do this in the past.

An additional minor change is being made to this paragraph to clarify that C/TPAs are not permitted to sign the annual antidrug program results reports for the employer. This minor change is necessary because an FAA-approved consortium was not permitted to sign its client's annual antidrug program results report in the past, therefore, we are clarifying that the same restriction applies to C/TPAs.

C. Access to Records and Facilities. In Notice No. 00–14, the FAA proposed to eliminate most of this section because 49 CFR part 40 sets out confidentiality and release of information requirements. Also, we proposed to retain language from current paragraph C.8, because it reinforces to the employer the requirement to comply with this appendix regarding access to all facilities.

We received one comment from ALPA and TTD stating that we should not eliminate current paragraph C.2, which entitles employees to obtain, and requires employers to provide, records relevant to charges that an employee violated the alcohol misuse prevention provisions. The FAA did not intend to eliminate this provision, and we proposed to keep a similar provision in appendix I (now paragraph VI.C. in appendix I). The FAA agrees with the comment, and therefore, we are not eliminating current paragraph C.2 in appendix J. We will retain paragraph C.2 with a minor change to reference 49 CFR part 40. In addition, because we are retaining current paragraph C.2, we have renumbered proposed paragraph C.2 to a new paragraph C.3 in this final rule.

V. Consequences for Employees Engaging in Alcohol-Related Conduct

C. Notice to Federal Air Surgeon. In Notice No. 00–14, we proposed changing paragraph C.4 in light of the changes to 49 CFR part 40 and the changes that arose from the 1996 amendment to 14 CFR part 67. In addition, we proposed adding a new paragraph C.5, clarifying the employer's obligation to ensure that the employee met the return to duty requirements following the recommendation of the Federal Air Surgeon.

The FAA received one comment from the ALPA and TTD on the proposed changes regarding 14 CFR part 67. The comment supports the proposed revisions and clarifications that make the drug testing and alcohol misuse prevention regulations consistent with the prior changes to 14 CFR part 67. Therefore, the changes are adopted as proposed, with minor editorial changes.

VI. Alcohol Misuse Information, Training, and Substance Abuse Professional

In Notice No. 00–14, the FAA proposed to change the title of this section from ''Alcohol Misuse Information, Training, and Referral'' to ''Alcohol Misuse Information, Training, and Substance Abuse Professional'' for clarity and organizational purposes. The FAA also proposed to change the title of paragraph C. from ''Referral, Evaluation, and Treatment'' to ''Substance Abuse Professional (SAP) Duties'' for clarity purposes and to conform to 49 CFR part 40. In addition, we proposed eliminating the majority of this paragraph because the SAP requirements are detailed in 49 CFR part 40, Subpart O. This paragraph now refers the reader to 49 CFR part 40 for SAP requirements.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed, with minor editorial changes.

VII. Employer's Alcohol Misuse Prevention Program

In Notice No. 00–14, the FAA proposed eliminating the requirement for an entity seeking to operate as a consortium to first submit to the FAA an alcohol misuse prevention program (AMPP) certification statement. For the same reasons we have eliminated consortium approvals in section IX of appendix I, we have eliminated the requirement for a consortium to submit an AMPP to the FAA. Similarly, we have removed the requirement for a consortium to notify the FAA of membership changes.

Also as proposed, we have removed any references to an ''FAA-approved consortium'' or ''consortium'' in paragraphs A.6 and A.7 because consortia are no longer required to submit AMPPs. We have eliminated paragraphs A.3 and A.8 and renumbered the remaining paragraphs accordingly.

In addition, as proposed in Notice No. 00–14, in paragraph B. we removed the requirement for employers and contractors to name their consortium in their AMPP certification statement. Furthermore, we eliminated the provisions allowing consortia to submit AMPP certification statements. Therefore, the FAA will not accept C/TPA's own AMPP certification statements, however, C/TPAs can continue to prepare and forward AMPP certification statements on behalf of their clients as long as the employer signs the AMPP certification statement.

For a discussion of the comments received on the issue of consortium approvals, see appendix I, section IX.

Paperwork Reduction Act

There are no new requirements for information collection associated with this amendment.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA determined that there are no ICAO Standards and Recommended Practices that correspond to these regulations.

Good Cause for Immediate Adoption

Generally, final rules must be published at least 30 days before their effective dates. However, the Administrative Procedure Act (5 U.S.C. sec. 553(d)(3)) creates an exception to this general rule on the basis of good cause found by the agency and published rule. The FAA is making this rule effective August 1, 2001, rather than 30 days from now. The good cause supporting this action is that the purpose of this rule is to ensure that the FAA's drug and alcohol testing regulations are consistent with the Department-wide 49 CFR part 40, which goes into effect on August 1, 2001. Unless the FAA's final rule becomes effective August 1, 2001, there may be overlap, conflict, duplication, or confusion between different DOT drug and alcohol testing regulations. The new 49 CFR part 40 was published over seven months ago, therefore affected parties have had ample time to prepare to implement the new regulations. The FAA's final rule merely implements the changes made by 49 CFR part 40, and additionally implements the 1996 final rule that changed 14 CFR part 67.

Executive Order 12866 and DOT Regulatory Policies and Procedures

The DOT prepared a regulatory analysis indicating that the modal proposals due to the changes in 49 CFR part 40 do not have any incremental economic impacts on their own. DOT also indicated that the modal proposed rules have been designated as non-significant under Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. For the regulatory evaluation of the actions that the FAA is making due to 49 CFR part 40, see the Department of Transportation's discussion in the preamble published concurrently with this final rule. In addition to the FAA's changes that are directly due to changes in 49 CFR part 40, the FAA is making certain clarifying changes to 14 CFR part 121, appendices I and J that are not directly due to 49 CFR part 40.

Executive Order 12866, Regulatory Planning and Review, directs the FAA to assess both the costs and benefits of a regulatory change. The FAA is not allowed to propose or adopt a regulation unless a reasoned determination is made that the benefits of the intended regulation justify the costs. The FAA's assessment of this Final Rule is that its economic impact is minimal. Since the costs and benefits of this rule do not make it a ''significant regulatory action'' as defined in the Order, the FAA has not prepared a ''regulatory evaluation,'' which is the written cost/benefit analysis ordinarily required for all rulemaking proposals under the DOT Regulatory Policies and Procedures. The FAA does not need to do the latter analysis where the economic impact of a proposal is minimal. These FAA amendments are being made because of DOT changes to 49 CFR part 40 and have no incremental economic impacts on their own, and the additional clarifying changes that are being made impose no new requirements; they merely clarify existing requirements.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation.'' To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the 1980 act provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The changes in this action make the FAA regulations consistent with the new requirements of 49 CFR part 40. In its rulemaking, the DOT performed an economic analysis of the changes made to 49 CFR part 40 and the impact of the changes on the modal industries. In addition to the changes being made because of the new 49 CFR part 40, the FAA is making revisions to conform to the current 14 CFR part 67. None of these changes, on their own, have incremental economic impacts. The FAA certifies that the rule does not have a significant economic impact on a substantial number of small entities.

International Trade Impact Analysis

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. In addition, consistent with the Administration's belief in the general superiority and desirability of free trade, it is the policy of the Administration to remove or diminish to the extent feasible, barriers to international trade, including both barriers affecting the export of American goods and services to foreign countries and barriers affecting the import of foreign goods and services into the United States.

In accordance with the above statute and policy, the FAA has assessed the potential effect of this rule and has determined that it has no effect on any trade-sensitive activity.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 (the Act), enacted as Public Law 104–4 on March 22, 1995, is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments.

Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private section; such a mandate is deemed to be a ''significant regulatory action.''

This rule does not contain such a mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

Executive Order 13132, Federalism

The FAA has analyzed this rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action does not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, we determined that this final rule does not have federalism implications.

Environmental Analysis

FAA order 1050.1d defines FAA actions that may be categorically excluded from preparation of a National Environmental Policy Act (NEPA) environmental assessment or environmental impact statement. In accordance with FAA Order 1050.1d, appendix 4, paragraph 4(j), this rulemaking action qualifies for a categorical exclusion.

Energy Impact

The energy impact of the notice has been assessed in accordance with the Energy Policy and Conservation Act (EPCA) Pub. L. 94–163, as amended (42 U.S.C. 6362) and FAA Order 1053.1. It has been determined that the final rule is not a major regulatory action under the provisions of the EPCA.

List of Subjects in 14 CFR Part 121

Air carriers, Aircraft, Aircraft pilots, Airmen, Alcohol abuse, Aviation safety, Charter flights, Drug abuse, Drug testing, Reporting and recordkeeping requirements, Safety, Transportation.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends part 121 of Title 14, Code of Federal Regulations, as follows:

PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS

1. The authority citation for part 121 is revised to read as follows:

Authority: 49 U.S.C.106(g), 40113, 40119, 41706, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 44901, 44903–44904, 44912, 45101–45105, 46105.

2. Amend appendix I to part 121 as follows:

A. Revise section I;

B. In section II, revise the definitions of ''Prohibited drug'', ''Refusal to submit'', ''Verified negative drug test result'', and ''Verified positive drug test result'';

C. Revise section IV;

D. In section V, revise paragraphs C. 6, F., G.2., G3., and G.4;

E. In section VI, revise paragraphs A. and B., remove paragraph C., redesignate paragraphs D., E., and F. as paragraphs C., D., and E., respectively, and revise newly redesignated paragraph C;

F. In section VII, revise the heading of the section, revise paragraphs A, B, and C, and remove paragraph D;

G. In section IX, revise the introductory text in paragraph 4, remove paragraph 4(b), redesignate paragraph 4(c) as paragraph 4(b) and revise it, revise paragraph 6;

H. In section X, revise paragraph F;

I. In section XII, revise the heading of the section and the introductory text in paragraph A; and

J. Add section XIII.

The revisions and additions read as follows:

Appendix I to Part 121—Drug Testing Program

* * * * *

I. *General*

A. *Purpose.* The purpose of this appendix is to establish a program designed to help prevent accidents and injuries resulting from the use of prohibited drugs by employees who perform safety-sensitive functions.

B. *DOT Procedures.* Each employer shall ensure that drug testing programs conducted pursuant to 14 CFR parts 65, 121, and 135 comply with the requirements of this appendix and the ''Procedures for Transportation Workplace Drug Testing Programs'' published by the Department of Transportation (DOT) (49 CFR part 40). An employer may not use or contract with any drug testing laboratory that is not certified by the Department of Health and Human Services (HHS) under the National Laboratory Certification Program.

C. *Employer Responsibility.* As an employer, you are responsible for all actions of your officials, representatives, and service agents in carrying out the requirements of this appendix and 49 CFR part 40.

II. *Definitions.* * * *

* * * * *

Prohibited drug means marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines, as specified in 49 CFR 40.85.

Refusal to submit means that a covered employee engages in conduct specified in 49 CFR 40.191.

* * * * *

Verified negative drug test result means a drug test result from an HHS-certified laboratory that has undergone review by an MRO and has been determined by the MRO to be a negative result.

Verified positive drug test result means a drug test result from an HHS-certified laboratory that has undergone review by an MRO and has been determined by the MRO to be a positive result.

* * * * *

IV. *Substances for Which Testing Must Be Conducted.* Each employer shall test each employee who performs a safety-sensitive function for evidence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines during each test required by section V. of this appendix.

V. *Types of Drug Testing Required.* * * *

* * * * *

C. *Random Testing.*

* * * * *

6. The employer shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random drug testing determined by the Administrator. If the employer conducts random drug testing through a Consortium/Third-party administrator (C/TPA), the number of employees to be tested may be calculated for each individual employer or may be based on the total number of covered employees covered by the C/TPA who are subject to random drug testing at the same minimum annual percentage rate under this part or any DOT drug testing rule.

* * * * *

F. *Return to Duty Testing.* Each employer shall ensure that before an individual is returned to duty to perform a safety-sensitive function after refusing to submit to a drug test required by this appendix or receiving a verified positive drug test result on a test conducted under this appendix the individual shall undergo a return to duty drug test. No employer shall allow an individual required to undergo return to duty testing to perform a safety-sensitive function unless the employer has received a verified negative drug test result for the individual. The test cannot occur until after the SAP has determined that the employee has successfully complied with the prescribed education and/or treatment.

G. *Follow-up Testing.* * * *

2. The number and frequency of such testing shall be determined by the employer's Substance Abuse Professional conducted in accordance with the provisions of 49 CFR part 40, but shall consist of at least six tests in the first 12 months following the employee's return to duty.

3. The employer may direct the employee to undergo testing for alcohol in accordance with appendix J of this part, in addition to drugs, if the Substance Abuse Professional determines that alcohol testing is necessary for the particular employee. Any such alcohol testing shall be conducted in accordance with the provisions of 49 CFR part 40.

4. Follow-up testing shall not exceed 60 months after the date the individual begins to perform or returns to the performance of a safety-sensitive function. The Substance Abuse Professional may terminate the requirement for follow-up testing at any time after the first six tests have been conducted, if the Substance Abuse Professional determines that such testing is no longer necessary.

VI. *Administrative and Other Matters.* A. *MRO Record Retention Requirements.* 1. Records concerning drug tests confirmed positive by the laboratory shall be maintained by the MRO for 5 years. Such

records include the MRO copies of the custody and control form, medical interviews, documentation of the basis for verifying as negative test results confirmed as positive by the laboratory, any other documentation concerning the MRO's verification process.

2. Should the employer change MROs for any reason, the employer shall ensure that the former MRO forwards all records maintained pursuant to this rule to the new MRO within ten working days of receiving notice from the employer of the new MRO's name and address.

3. Any employer obtaining MRO services by contract, including a contract through a C/TPA, shall ensure that the contract includes a recordkeeping provision that is consistent with this paragraph, including requirements for transferring records to a new MRO.

B. *Access to Records.* The employer and the MRO shall permit the Administrator or the Administrator's representative to examine records required to be kept under this appendix and 49 CFR part 40. The Administrator or the Administrator's representative may require that all records maintained by the service agent for the employer must be produced at the employer's place of business.

C. *Release of Drug Testing Information.* An employer shall release information regarding an employee's drug testing results, evaluation, or rehabilitation to a third party in accordance with 49 CFR part 40. Except as required by law, this appendix, or 49 CFR part 40, no employer shall release employee information.

* * * * *

VII. *Medical Review Officer, Substance Abuse Professional, and Employer Responsibilities.* * * *

A. *Medical Review Officer (MRO).* The MRO must perform the functions set forth in 49 CFR part 40, Subpart G, and this appendix. The MRO shall not delay verification of the primary test result following a request for a split specimen test unless such delay is based on reasons other than the fact that the split specimen test result is pending. If the primary test result is verified as positive, actions required under this rule (e.g., notification to the Federal Air Surgeon, removal from safety-sensitive position) are not stayed during the 72-hour request period or pending receipt of the split specimen test result.

B. *Substance Abuse Professional (SAP).* The SAP must perform the functions set forth in 49 CFR part 40, Subpart O.

C. *Additional Medical Review Officer, Substance Abuse Professional, and Employer Responsibilities Regarding 14 CFR part 67 Airman Medical Certificate Holders.* 1. As part of verifying a confirmed positive test result, the MRO shall inquire, and the individual shall disclose, whether the individual is or would be required to hold a medical certificate issued under 14 CFR part 67 of this chapter to perform a safety sensitive function for the employer. If the individual answers in the negative, the MRO shall then inquire, and the individual shall disclose, whether the individual currently holds a medical certificate issued under 14 CFR part 67. If the individual answers in the affirmative to either question, in addition to notifying the employer in accordance with 49 CFR part 40, the MRO must forward to the Federal Air Surgeon, at the address listed in paragraph 4, the name of the individual, along with identifying information and supporting documentation, within 12 working days after verifying a positive drug test result.

2. The SAP shall inquire, and the individual shall disclose, whether the individual is or would be required to hold a medical certificate issued under 14 CFR part 67 of this chapter to perform a safety sensitive function for the employer. If the individual answers in the affirmative, the SAP cannot recommend that the individual be returned to a safety-sensitive function that requires the individual to hold a 14 CFR part 67 medical certificate unless and until such individual has received a medical certificate or a special issuance medical certificate from the Federal Air Surgeon. The receipt of a medical certificate or a special issuance medical certificate does not alter any obligations otherwise required by 49 CFR part 40 or this appendix.

3. The employer must forward to the Federal Air Surgeon a copy of any report provided by the SAP, if available, regarding an individual for whom the MRO has provided a report to the Federal Air Surgeon under section VII.C.1 of this appendix, within 12 working days of the employer's receipt of the report.

4. The employer cannot permit an employee who is required to hold a medical certificate under part 67 of this chapter to perform a safety-sensitive duty to resume that duty until the employee has received a medical certificate or a special issuance medical certificate from the Federal Air Surgeon unless and until the employer has ensured that the employee meets the return-to-duty requirements in accordance with 49 CFR part 40.

5. Reports required under this section shall be forwarded to the Federal Air Surgeon, Federal Aviation Administration, Attn: Drug Abatement Division (AAM–800), 800 Independence Avenue, SW., Washington, DC 20591.

* * * * *

IX. Employer's Antidrug Program Plan. A. *Schedule for Submission of Plans and Implementation.* * * *

* * * * *

4. Any entity or individual whose employees perform safety-sensitive functions pursuant to a contract with an employer (as defined in section II of this appendix), may submit an antidrug program plan to the FAA for approval on a form and in a manner prescribed by the Administrator.

* * * * *

(b) Each contractor shall implement its antidrug program in accordance with the terms of its approved plan.

* * * * *

6. Each employer, or contractor company that has submitted an antidrug plan directly to the FAA, shall obtain appropriate approval from the FAA prior to changing programs.

* * * * *

X. *Reporting of Antidrug Program Results.*

* * * * *

F. A C/TPA may prepare reports on behalf of individual aviation employers for purposes of compliance with this reporting requirement. However, the aviation employer shall sign and submit such a report and shall remain responsible for ensuring the accuracy and timeliness of each report prepared on its behalf by a C/TPA. A C/TPA must not sign the form.

* * * * *

XII. *Testing Outside the Territory of the United States.* A. No part of the testing process (including specimen collection, laboratory processing, and MRO actions) shall be conducted outside the territory of the United States.

* * * * *

XIII. *Waivers from 49 CFR 40.21.* An employer subject to this part may petition the Drug Abatement Division, Office of Aviation Medicine, for a waiver allowing the employer to stand down an employee following a report of a laboratory confirmed positive drug test or refusal, pending the outcome of the verification process.

A. Each petition for a waiver must be in writing and include substantial facts and justification to support the waiver. Each petition must satisfy the substantive requirements for obtaining a waiver, as provided in 49 CFR 40.21.

B. Each petition for a waiver must be submitted to the Federal Aviation Administration, Office of Aviation Medicine, Drug Abatement Division (AAM–800), 800 Independence Avenue, SW., Washington, DC 20591.

C. The Administrator may grant a waiver subject to 49 CFR 40.21(d).

3. Amend appendix J to part 121 as follows:

A. In section I, redesignate paragraphs C through F as paragraphs D through G, add new paragraph C, and amend newly redesignated paragraph D to remove the definitions for ''Confirmation Test'', ''Consortium'', and ''Screening Test'', to remove the definition of ''Refuse to submit (to an alcohol test)'' and to add the definition ''Refusal to submit'' in alphabetical order;

B. In section III, revise paragraph A, revise the heading of paragraph B, and revise paragraphs B.2 and C.6; remove paragraph D.4.(b); redesignate paragraphs D.4.(c) and D.4.(d) as paragraphs D.4.(b) and D.4.(c); revise newly redesignated paragraph D.4.(c); and revise paragraphs E and F;

C. In section IV, revise paragraphs A., B.8, C.2 and C.3, and remove paragraphs C.4 through C.8;

D. In section V, revise paragraph C.4 and add paragraph C.5;

E. In section VI, revise the section heading and paragraph C; and

F. In section VII, remove paragraphs A.3 and A.8; redesignate paragraphs A.4 through A.7 as paragraphs A.3 through

A.6, respectively, revise newly redesignated paragraph A.6, redesignate paragraph A.9 as paragraph A.7 and revise it; remove paragraph B.1(d); redesignate paragraph B.1(e) as paragraph B.1(d); remove paragraph B.2.

The revisions and additions read as follows:

Appendix J to Part 121—Alcohol Misuse Prevention Program

I. General

C. *Employer Responsibility.* As an employer, you are responsible for all actions of your officials, representatives, and service agents in carrying out the requirements of the DOT agency regulations.

D. *Definitions*

* * * * *

Refusal to submit means that a covered employee engages in conduct specified in 49 CFR 40.261.

* * * * *

III. Tests Required

A. Pre-employment testing

As an employer, you may, but are not required to, conduct pre-employment alcohol testing under this part. If you choose to conduct pre-employment alcohol testing, you must comply with the following requirements:

1. You must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions).

2. You must treat all safety-sensitive employees performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (i.e., you must not test some covered employees and not others).

3. You must conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test.

4. You must conduct all pre-employment alcohol tests using the alcohol testing procedures of 49 CFR Part 40.

5. You must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates an alcohol concentration of less than 0.04.

B. Post-Accident Testing

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2. If a test required by this section is not administered within 2 hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within 8 hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the same record. Records shall be submitted to the FAA upon request of the Administrator or his or her designee.

* * * * *

C. Random Testing

* * * * *

6. The employer shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random alcohol testing determined by the Administrator. If the employer conducts random testing through a Consortium/Third-party administrator (C/TPA), the number of employees to be tested may be calculated for each individual employer or may be based on the total number of covered employees who are subject to random alcohol testing at the same minimum annual percentage rate under this appendix or any DOT alcohol testing rule.

* * * * *

D. Reasonable Suspicion Testing

* * * * *

4. * * *

(c) No employer shall take any action under this appendix against a covered employee based solely on the employee's behavior and appearance in the absence of an alcohol test. This does not prohibit an employer with authority independent of this appendix from taking any action otherwise consistent with law.

E. Return to Duty Testing

Each employer shall ensure that before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited in § 65.46a, § 121.458, or § 135.253 of this chapter, the employee shall undergo a return to duty alcohol test with a result indicating an alcohol concentration of less than 0.02. The test cannot occur until after the SAP has determined that the employee has successfully complied with the prescribed education and/or treatment.

F. Follow-up Testing

1. Each employer shall ensure that the employee who engages in conduct prohibited by § 65.46a, § 121.458, or § 135.253 of this chapter is subject to unannounced follow-up alcohol testing as directed by a SAP.

2. The number and frequency of such testing shall be determined by the employer's SAP, but must consist of at least six tests in the first 12 months following the employee's return to duty.

3. The employer may direct the employee to undergo testing for drugs, if the SAP determines that drug testing is necessary for the particular employee. Any such drug testing shall be conducted in accordance with the provisions of 49 CFR part 40.

4. Follow-up testing shall not exceed 60 months after the date the individual begins to perform or returns to the performance of a safety-sensitive function. The SAP may terminate the requirement for follow-up testing at any time after the first six tests have been conducted, if the SAP determines that such testing is no longer necessary.

5. A covered employee shall be tested for alcohol under this paragraph only while the employee is performing safety-sensitive functions, just before the employee is to perform safety-sensitive functions, or just after the employee has ceased performing such functions.

* * * * *

IV. Handling of Test Results, Record Retention, and Confidentiality

A. Retention of Records

1. *General Requirement.* In addition to the records required to be maintained under 49 CFR part 40, employers must maintain records required by this appendix in a secure location with controlled access.

2. *Period of retention.*

(a) *Five years.*

(1) Copies of any annual reports submitted to the FAA under this appendix for a minimum of 5 years.

(2) Records of notifications to the Federal Air Surgeon of violations of the alcohol misuse prohibitions in this chapter by covered employees who hold medical certificates issued under part 67 of this chapter.

(3) Documents presented by a covered employee to dispute the result of an alcohol test administered under this appendix.

(4) Records related to other violations of § 65.46a, § 121.458, or § 135.253 of this chapter.

(b) *Two years.* Records related to the testing process and training required under this appendix.

(1) Documents related to the random selection process.

(2) Documents generated in connection with decisions to administer reasonable suspicion alcohol tests.

(3) Documents generated in connection with decisions on post-accident tests.

(4) Documents verifying existence of a medical explanation of the inability of a covered employee to provide adequate breath for testing.

(5) Materials on alcohol misuse awareness, including a copy of the employer's policy on alcohol misuse.

(6) Documentation of compliance with the requirements of section VI, paragraph A of this appendix.

(7) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion.

(8) Certification that any training conducted under this appendix complies with the requirements for such training.

B. Reporting of Results in a Management Information System

* * * * *

8. A C/TPA may prepare reports on behalf of individual aviation employers for purposes of compliance with this reporting requirement. However, the aviation employer shall sign and submit such a report and shall remain responsible for ensuring the accuracy and timeliness of each report prepared on its behalf by a C/TPA. A C/TPA must not sign the form.

C. Access to Records and Facilities

* * * * *

2. A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the employee's use of alcohol, including any records pertaining to his or her alcohol tests in accordance with 49 CFR part 40. The employer shall promptly provide the records requested by the employee. Access to an employee's records shall not be contingent upon payment for records other than those specifically requested.

3. Each employer shall permit access to all facilities utilized in complying with the requirements of this appendix to the Secretary of Transportation or any DOT agency with regulatory authority over the employer or any of its covered employees.

V. Consequences for Employees Engaging in Alcohol-Related Conduct

* * * * *

C. Notice to the Federal Air Surgeon

* * * * *

4. No covered employee who is required to hold a medical certificate under part 67 of this chapter to perform a safety-sensitive duty shall perform that duty following a violation of this appendix until and unless the Federal Air Surgeon has recommended that the employee be permitted to perform such duties.

5. Once the Federal Air Surgeon has recommended under paragraph C.4. of this section that the employee be permitted to perform safety-sensitive duties, the employer cannot permit the employee to perform those safety-sensitive duties until the employer has ensured that the employee meets the return to duty requirements in accordance with 49 CFR part 40.

* * * * *

VI. Alcohol Misuse Information, Training, and Substance Abuse Professional

* * * * *

C. Substance Abuse Professional (SAP) Duties

The SAP must perform the functions set forth in 49 CFR part 40, Subpart O, and this appendix.

VII. Employer's Alcohol Misuse Prevention Program

A. Schedule for Submission of Certification Statements and Implementation

* * * * *

6. The duplicate certification statement shall be annotated indicating receipt by the FAA and returned to the employer or contractor company.

7. Each employer, and each contractor company that submits a certification statement directly to the FAA, shall notify the FAA of any proposed change in status, (e.g., join another carrier's program) prior to the effective date of such change. The employer or contractor company must ensure that it is continuously covered by an FAA-mandated alcohol misuse prevention program.

* * * * *

Issued in Washington, DC on July 17, 2001.

Jane F. Garvey,

Administrator.

[FR Doc. 01–19231 Filed 8–2–01; 4:41 pm]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 219

[Docket No. FRA 2000–8583 (Formerly FRA Docket No. RSOR–6); Notice No. 49]

RIN 2130–AB43

Control of Alcohol and Drug Use: Changes To Conform to New DOT Transportation Workplace Testing Procedures

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT or Department).

ACTION: Final rule.

SUMMARY: FRA is publishing a final rule conforming its drug and alcohol testing regulation to the December 19, 2000 revision of DOT's transportation workplace testing procedures. Consistency between the FRA's rule and DOT's revision is important in order to avoid overlap, conflict, duplication, or confusion among DOT drug and alcohol testing regulations.

DATES: This rule becomes effective August 1, 2001.

ADDRESSES: The Department of Transportation's Docket Management System allows the public access through the internet to all documents filed in a particular proceeding. The April 30, 2001 NPRM (formerly FRA Docket RSOR–6, Notice No. 48) and the comments to it, may be found with this rule under Docket No. FRA 2000–8583. Docket No. FRA 2000–8583 may be accessed through the Department's Docket Management System website at *http://dms.dot.gov.*

For instructions on how to use this system, visit the Docket Management System Web Site and click on the ''Help'' menu. This docket is also available for inspection or copying at room PL–401 on the plaza level of the Nassif Building at the U.S. Department of Transportation, 400 7th Street, S.W., Washington, D.C. 20590–0001, during regular business hours.

FOR FURTHER INFORMATION CONTACT: Lamar Allen, Alcohol and Drug Program Manager, FRA Office of Safety, RRS–11, 1120 Vermont Avenue, N.W., Mail Stop 25, Washington, D.C. 20590 (telephone 202–493–6313); or Patricia V. Sun, Trial Attorney, Office of the Chief Counsel, RCC–11, 1120 Vermont Avenue, N.W., Mail Stop 10, Washington, D.C. 20590 (telephone 202–493–6038).

SUPPLEMENTARY INFORMATION:

Background

In this rule FRA finalizes changes to conform its drug and alcohol testing regulation (49 CFR Part 219) to the recently published revision of DOT's procedures for transportation workplace drug and alcohol testing programs (49 CFR Part 40) (December 19, 2000, 65 FR 79462). These changes were proposed in an NPRM that FRA published (April 30, 2001, 66 FR 21511) concurrently with NPRMs from the Federal Aviation Administration, the Federal Motor Carrier Safety Administration, the Federal Transit Administration, the Research and Special Programs Administration, and the United States Coast Guard.

FRA adopts the proposals in the NPRM without change (with the exceptions of the penalty schedule published in Appendix A, which is slightly different from the one contained in the NPRM as discussed below; and, to be more consistent with Part 40 terminology, the substitution of ''specimen'' for ''sample'' wherever that term appeared in this rule). FRA received four comments to the NPRM, each of which is discussed in detail below. The majority of the comments concerned Department-wide issues, which are more properly addressed in Part 40 rather than individual modal rules, or raised issues beyond the scope of the NPRM's proposed conforming changes, technical amendments, and corrections.

In addition to conforming Part 219 with the new Part 40, FRA makes corrections to comply with **Federal Register** format requirements and delete outdated rule text references. FRA also makes technical changes to its statutory citations by replacing citations to the Federal Railroad Safety Act of 1970 and the Hours of Service Act (which were repealed in 1994) with references to the proper sections or chapters in title 49 of the United States Code. *See* Public Law 103–272.

Generally, final rules must be published at least 30 days before their effective dates. However, the Administrative Procedure Act (5 U.S.C. 553(d)(3)) creates an exception to this general rule on the basis of good cause found by the agency. FRA is making this conforming rule effective immediately upon publication, rather than 30 days from now to ensure that FRA's drug and alcohol testing regulation is consistent with the Department's Part 40 testing procedures, which become effective on

August 1, 2001. Unless this rule goes into effect immediately, there would be a 30-day period in which Part 40 would be in effect without FRA's conforming changes to Part 219. Since the new Part 40 was published over seven months ago, affected parties have had ample time to prepare to implement the changes in Part 40 which this rule conforms to Part 219.

For ease of reference, FRA is publishing Part 219 in its entirety with these conforming changes, technical amendments, and corrections.

Comments to the NPRM

Summaries of the four comments appear below. FRA will also discuss comments addressed to specific sections of the NPRM in the section-by-section analysis.

(1) The United Transportation Union-Nebraska State Legislative Board (UTU-Nebraska) approved of the proposed changes to conform Part 219 to Part 40. Most of the UTU's comments would require major substantive changes that are beyond the scope of the NPRM (e.g., requiring non-Federal testing to comply with Part 219; excluding accidents wholly attributable to pedestrians from post-accident testing), or are more properly directed to a Part 40 rulemaking since they have intermodal application (e.g., requiring employers to provide and pay for the testimony of laboratory personnel if requested by an employee). FRA invites the UTU-Nebraska to resubmit these comments in future rulemakings when FRA proposes major revisions to Part 219.

In its comments, the UTU alleged that it is an ''everyday practice'' for a railroad to permit a crew who has been drug and/or alcohol tested after a derailment to return to covered service until the completion of their duty tour. In these circumstances, the UTU states that a railroad should not immediately return the crew to covered service after testing since the basis for the tests was the railroad's reasonable belief that the crew's actions might have adversely affected safety by contributing to the occurrence or severity of the derailment. This scenario may arise under FRA-mandated or company testing programs. FRA has previously noted that not every ''testable'' event should give rise to a presumption that the employee is unfit because of alcohol or drug use. To the contrary, the employee's status should normally be determined without regard to the conduct of a test. To withdraw a person from service solely because a specimen has been collected would attach an unwarranted stigma. Rather, employees should be returned to or placed in service wholly on the basis of their documented conduct until such time as a fully reviewed, positive test result is reported by the MRO. Accordingly, the issue of handling employees who have been involved in events calling into question their willingness or ability to work safely should be handled outside the context of this rulemaking.

(2) The Brotherhood of Locomotive Engineers (BLE) also supported the conforming changes to Part 219 and the recent changes to Part 40. In addition, the BLE submitted comments specific to sections of the NPRM, which are discussed in the section-by-section analysis.

(3) The Airline Pilots Association and Transportation Trades Department, AFL–CIO raised concerns about DOT's validity testing procedures. FRA will not separately discuss these comments, since this Part 40 issue is addressed in the Common Preamble.

(4) The Drug & Alcohol Testing Industry Association recommended six provisions for adoption in all of the modal rules. FRA will also not separately discuss these comments, since they raise Part 40 issues which are addressed in the Common Preamble.

Section-by-Section Analysis

Subpart A—General

Section 219.5 Definitions

As proposed, FRA deletes from Part 219 those definitions that can now be found in § 40.3: *Alcohol, Alcohol concentration, Alcohol use, Consortium, DOT agency, Drug(s),* and *Medical Review Officer;* as well as *Refuse to submit* (to a drug test) and *Refuse to submit* (to an alcohol test), which are defined in §§ 40.191 and 40.261, respectively. Definitions specific to Part 219, the rail industry, or both, such as *Covered employee* and *Railroad,* remain in this rule.

Also as proposed, the definitions of *Class I, Class II,* and *Class III* have been revised by deleting '', as those regulations may be revised and applied by order of the Board (including modifications in class thresholds based on revenue deflator adjustments).'' The purpose of this change is to conform to Federal Register requirements; no substantive change is intended.

FRA also deletes the outdated references to the 1991 through 1999 accident reporting thresholds from these definitions: *Impact accident, Reporting threshold,* and *Train accident.* See the discussion of § 219.201 for a further discussion of the changes to these definitions.

Section 219.7 Waivers

Paragraph (b)

As proposed, FRA's Railroad Safety Board will determine each petition for stand down in accordance with § 40.21 and Subpart C of 49 CFR Part 211, which contains the rules of practice governing petitions for waiver of FRA safety rules, regulations or standards. Section 40.21 maintains the Departmental policy of prohibiting employers from standing employees down unless the concerned DOT agency grants a waiver to this prohibition.

The BLE, concerned that allowing stand down may result in unfair damage to employee reputations, stressed that FRA should grant waivers only if a railroad can demonstrate that the strict standards of § 40.21 will be met, and should immediately suspend or revoke that waiver if the railroad should fail to effectively protect employee interests in fairness and confidentiality. FRA agrees with the BLE's concerns and recommendations, and will carefully examine petitions for stand down waivers; when a waiver is granted, FRA will monitor the stand down program to ensure continuing compliance with section 40.21.

For an additional discussion of the BLE's comments on stand down, see the analysis of section 219.23 below.

Section 219.11 General Conditions for Chemical Tests

Paragraph (b)

FRA deletes the last two sentences of § 219.11(b)(2), which addresses the use of catheterization to obtain urine specimens for testing, and subparagraph (b)(4), which makes tampering with a specimen through adulteration, dilution, or substitution a refusal to provide a specimen. In Part 40, DOT addresses the use of catheterization in § 40.61(b)(3), what constitutes a refusal to provide a specimen in § 40.191, and what an employer must do following a verified adulterated or substituted test result in § 40.23.

Section 219.21 Information Collection

FRA updates the list of information collection requirements in this section by adding §§ 219.801, 219.803, 219.901, and 219.903 from the annual report and recordkeeping requirements found in Subparts I and J, respectively, of this part; which were approved by the Office of Management and Budget before their implementation in 1994. FRA also adds an information collection requirement for § 219.502, which authorizes pre-employment alcohol testing, and deletes the information collection requirements

for §§ 219.307, 219.309, 219.703, 219.705, 219.707, 219.709, 219.711, and 219.713, all of which have been deleted from Part 219.

Section 219.23 Railroad Policies

Paragraph (b)

FRA adds new language reiterating the prohibition in § 40.47 against the use of DOT custody and control forms for non-DOT testing. Section 219.23 is otherwise unchanged.

The BLE requested that FRA require a railroad to provide the terms of the waiver to the heads of its affected labor organizations if FRA grants the railroad's petition for a waiver from Part 40's stand down prohibition. FRA agrees that this is sound labor-management policy, but adding a new requirement is unnecessary, since this is already covered by § 219.23(d), which requires railroads to provide educational materials explaining the requirements of Part 219 to each of their covered employees, and to ''provide written notice to representatives of employee organizations of the availability of this information.'' The implementation of a new stand down program consistent with the terms of an FRA waiver would be a major modification of the railroad's drug and alcohol program requiring such notification.

Subpart B—Prohibitions

Section 219.102 Prohibitions on Abuse of Controlled Substances

FRA deletes the 1989 implementation date from this section.

Section 219.103 Prescribed and Over-the-Counter Drugs

Although FRA had proposed no changes to the text of this section, the BLE noted that the proposed penalty schedule adds a penalty guideline of $2,500 for a violation and $5,000 for a willful violation. The BLE expressed concern that the addition of this guideline could result in ''inconsistent or arbitrary'' penalties being assessed against individual employees for prescription and over-the-counter drug use. The addition of a penalty guideline for a violation of § 219.103 does not mean that FRA is creating a new basis for railroad or individual liability, since FRA has always had the authority to assess penalties for a violation of this section. As stated below and in the preamble to the NPRM, the guidelines in the penalty schedule are illustrative, not comprehensive, and FRA retains the authority to assess penalties for violations not listed in the penalty schedule. (See footnote 1 to the penalty schedule, in which the Federal Railroad Administrator reserves the right to assess a penalty of up to $22,000 for any violation of Part 219).

Section 219.104 Responsive Action

Paragraph (d)

As proposed, FRA deletes its return-to-service and follow-up testing requirements, and its Substance Abuse Professional (SAP) conflict-of-interest prohibitions, and instead references the sections in Part 40 that cover these requirements (§§ 40.305, 40.307, and 40.299, respectively) in amended paragraph (d). FRA also deletes paragraphs (e) and (f) of this section, which are now unnecessary, and paragraph (g) of this section, which mandated a 1995 implementation date for certain requirements in this section.

Subpart C—Post-Accident Toxicological Testing

As stated in § 40.1(c), nothing in Part 40 supersedes or conflicts with FRA's post-accident testing program; Part 40 procedures do not apply to FRA post-accident toxicological testing, which has always followed its own unique procedures. Since Subpart C did not need to be conformed to Part 40, the only changes to this subpart are minor technical ones.

As proposed, FRA is streamlining its procedures for notification after post-accident events. One-stop notification to the National Response Center (NRC) is now sufficient for problems in obtaining specimens from an injured employee (§ 219.203(d)(2)) or an employee fatality (§ 219.207(b)), although FRA still requires railroads to notify both the NRC and FRA whenever post-accident testing is conducted (§ 219.209). The remaining technical changes are discussed below.

Section 219.201 Events for Which Testing Is Required

Paragraph (a)

In its annual adjustment of the accident reporting threshold, FRA decided to leave the $6,600 accident reporting threshold unchanged for calendar year 2001 (November 21, 2000, 65 FR 69884). The reporting threshold final rule, which became effective January 1, 2001, amends this section and the definitions of *Impact accident, Reporting Threshold,* and *Train Accident* found in § 219.5.

FRA removes the outdated references to the accident reporting thresholds listed for the years 1991–1999. To streamline this part, FRA incorporates the accident reporting threshold set annually in § 225.19(e) of its accident reporting rule (49 CFR Part 225) instead of listing the threshold for each year in this section and in the definitions listed above in § 219.5.

Section 219.211 Analysis and Follow-Up

Paragraph (i)

FRA amends this paragraph, which formerly allowed an employee the right to request a retest of his or her post-accident specimens. This right has not existed since FRA incorporated split specimen testing into its post-accident testing procedures in 1994. The employee still has up to 60 days from the date of the toxicology report (instead of 72 hours from notification by the MRO as in § 40.171) to request that his or her past-accident split specimens be tested.

Subpart D—Testing for Cause

Section 219.300 Mandatory Reasonable Suspicion Testing

Paragraph (a)

FRA removes the 1995 implementation date from this paragraph.

Paragraph (d)(2)

FRA deletes this paragraph which contained reporting requirements that expired on March 15, 1998.

Section 219.303 Alcohol Test Procedures and Safeguards

FRA deletes this section, since alcohol testing conducted under this subpart now follows Part 40 procedures.

Section 219.305 Urine Test Procedures and Safeguards

FRA deletes this section since the revised § 219.701 consolidates the requirements that Subpart B, D, F and G testing be conducted in accordance with Part 40 procedures.

Subpart E—Identification of Troubled Employees

This subpart is unchanged except for the amendment to § 219.403 discussed below.

Section 219.403 Voluntary Referral Policy

Subparagraph (b)(5)

With respect to a certified locomotive engineer and a candidate for certification, Section 240.119(e) of FRA's regulations on qualification and certification of locomotive engineers (49 CFR Part 240) requires the railroad to waive its policy of confidentiality and suspend or revoke the engineer's certificate if the SAP reports that the engineer has failed to cooperate with a

course of recommended treatment. For ease of reference, FRA adds a new subparagraph cross-referencing this requirement, which applies to all voluntary referral policies.

Subpart F—Pre-Employment Tests

Section 219.501 Pre-Employment Drug Testing

FRA revises this subpart to delete an outdated implementation schedule and separately addresses pre-employment drug testing and pre-employment alcohol testing. Section 219.501 now addresses only pre-employment drug testing requirements, which are unchanged.

Section 219.502 Pre-Employment Alcohol Testing

New § 219.502 incorporates the Department's language reauthorizing pre-employment alcohol testing, which had been suspended in May 1995 (May 10, 1995, 60 FR 24766). Pre-employment alcohol testing, unlike pre-employment drug testing, is authorized but not required.

Section 219.503 Notification; Records

FRA removes the references in this section to ''urine and breath tests'' and replaces these with more generic references to ''drug and alcohol tests.''

Subpart G—Random Alcohol and Drug Testing Programs

Section 219.601 Railroad Random Drug Testing Programs

Paragraph (a) and Subparagraph (d)(2)

FRA deletes the outdated implementation schedule from this section. New railroads must submit a random testing program for FRA approval within 60 days after commencing operations, and implement the program as approved within 60 days of receiving approval.

Section 219.605 Positive Drug Test Results; Procedures

Paragraph (a) of this section is removed and reserved, since it has been superseded by the MRO verification requirements in § 40.129. FRA also deletes the now unnecessary reference to a ''retest'' from paragraph (b) of this section.

Section 219.607 Railroad Random Alcohol Testing Programs

Paragraph (a) and Subparagraph (c)(2)

As with § 219.601, FRA deletes the outdated implementation schedule and specifies implementation requirements for new railroads.

Section 219.608 Administrator's Determination of Random Alcohol Testing Rate

Subparagraph (b)(1)(i)

This subparagraph specifies the implementation requirements for new railroads.

Subpart H—Drug and Alcohol Testing Procedures

Section 219.701 Standards for Drug and Alcohol Testing

As discussed above, FRA consolidates in this section the requirement that testing under Subparts B, D, F, and G of this part comply with Part 40 procedures. In new paragraph (c) of this section, FRA expands the requirement (formerly found in § 219.715(a), which has been deleted), that an employee proceed to the testing site immediately upon notification of selection, to apply to random drug testing as well as to random alcohol testing. FRA deletes the rest of this subpart (§§ 219.703–219.715), since it has been superseded by Part 40.

Subpart I—Annual Report

There are no changes to the reporting requirements of FRA's Management Information System (MIS). Concerned about the variability in standards among railroad testing programs, the BLE commented that the MIS should not include data on urine alcohol tests conducted under railroad authority unless the railroad's testing program uses testing procedures that ''meet the same level of confidence'' as the protocols used in the FRA post-accident testing program. Otherwise, the BLE recommended that such data not be reported until the Department of Health and Human Services develops urine alcohol testing standards. FRA will continue to require urine alcohol testing data to be reported, since FRA uses this data to monitor independent railroad testing programs to ensure that they do not violate Part 219 by conducting urine alcohol testing under Federal authority.

Subpart J—Recordkeeping Requirements

Section 219.901 Retention of Alcohol Testing Records

Section 219.903 Retention of Drug Testing Records

FRA deletes recordkeeping requirements that duplicate those contained in various sections of Part 40. In addition to the employer recordkeeping requirements in § 40.333, Part 40 now requires service agents to maintain copies of records that were formerly required to be kept by employers, so that some of the recordkeeping responsibilities currently in §§ 219.901 and 219.903 have shifted from railroads to their service agents.

Appendix A to Part 219—Schedule of Civil Penalties

The revised schedule of civil penalties printed below has a slightly different structure and lists more guideline penalty amounts than the schedule in the NPRM. These structural changes and additional examples are intended to make the schedule clearer as a guide to proposed assessments for violations of Part 219. As before, the illustrations provided are illustrative, not comprehensive, and FRA reserves the right to assess a penalty of up to $22,000 for any violation of this rule, including violations not listed in this penalty schedule.

The additional violations listed have proposed assessments equivalent to violations already listed in the penalty schedule. Penalties listed at the statutory minimum of $500 (see § 209.409 in FRA's railroad safety enforcement procedures (49 CFR Part 209)), however, are now $1,000.

Appendix D to Part 219—Management Information System Collection Forms

As proposed, FRA deletes Appendix D, which reprints MIS forms that have been in use since 1994. The BLE commented that it could not find the MIS forms in the Part 40 final rule; this is because the forms for FRA's MIS system are specific to Part 219 only. These forms can now be downloaded from FRA's web site at http://www.fra.dot.gov/site/index.htm.

Regulatory Analyses and Notices

This rule has been determined to be nonsignificant, since it makes policy changes only to the extent necessary to conform Part 219 to the changes already made in Part 40. The other purpose of this rule is to update Part 219 by making corrections and deleting outdated references.

This rule has also been determined not to be economically significant since its reworking of existing requirements does not result in significant new costs. FRA did not prepare a Regulatory Evaluation of the costs and benefits of this rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, FRA determined that there are no new requirements for information collection associated with this rule.

List of Subjects in 49 CFR Part 219

Alcohol abuse, Drug abuse, Drug testing, Penalties, Railroad safety, Reporting and recordkeeping requirements, Safety, Transportation.

The Rule

For the reasons stated above, FRA revises 49 CFR Part 219 to read as follows:

PART 219—CONTROL OF ALCOHOL AND DRUG USE

Subpart A—General

Subpart B—Prohibitions

Subpart C—Post-Accident Toxicological Testing

Subpart D—Testing for Cause

Subpart E—Identification of Troubled Employees

Subpart F—Pre-Employment Tests

Subpart G—Random Alcohol and Drug Testing Programs

Subpart H—Drug and Alcohol Testing Procedures

Subpart I—Annual Report

Subpart J—Recordkeeping Requirements

Authority: 49 U.S.C. 20103, 20107, 20140, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49(m).

Subpart A—General

§ 219.1 Purpose and scope.

(a) The purpose of this part is to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.

(b) This part prescribes minimum Federal safety standards for control of alcohol and drug use. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

§ 219.3 Application.

(a) Except as provided in paragraphs (b) and (c) of this section, this part applies to—

(1) Railroads that operate rolling equipment on standard gauge track which is part of the general railroad system of transportation; and

(2) Railroads that provide commuter or other short-haul rail passenger service in a metropolitan or suburban area (as described by 49 U.S.C. 20102).

(b)(1) This part does not apply to a railroad that operates only on track inside an installation which is not part of the general railroad system of transportation.

(2) Subparts D, E, F and G of this part do not apply to a railroad that employs not more than 15 employees covered by the hours of service laws at 49 U.S.C. 21103, 21104, or 21105, and that does not operate on tracks of another railroad (or otherwise engage in joint operations with another railroad) except as necessary for purposes of interchange.

(3) Subpart I of this part does not apply to a railroad that has fewer than 400,000 total manhours.

(c) Subparts E, F and G of this part do not apply to operations of a foreign railroad conducted by covered service employees whose primary place of service (''home terminal'') for rail transportation services is located outside the United States. Such operations and employees are subject to Subparts A, B, C, and D of this part when operating in United States territory.

§ 219.5 Definitions.

As used in this part—

Class I, Class II, and *Class III* have the meaning assigned by regulations of the Surface Transportation Board (49 CFR part 1201; General Instructions 1–1).

Controlled substance has the meaning assigned by 21 U.S.C. 802, and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR Parts 1301–1316).

Covered employee means a person who has been assigned to perform service subject to the hours of service laws (49 U.S.C. ch. 211) during a duty tour, whether or not the person has performed or is currently performing such service, and any person who performs such service. (An employee is not ''covered'' within the meaning of this part exclusively by reason of being an employee for purposes of 49 U.S.C. 21106.) For the purposes of pre-employment testing only, the term ''covered employee'' includes a person applying to perform covered service.

Co-worker means another employee of the railroad, including a working supervisor directly associated with a yard or train crew, such as a conductor or yard foreman, but not including any other railroad supervisor, special agent, or officer.

DOT Agency means an agency (or ''operating administration'') of the United States Department of Transportation administering regulations requiring alcohol or

controlled substance testing (14 CFR parts 61, 63, 65, 121 and 135; 49 CFR parts 199, 219, 382 and 655) in accordance with Part 40 of this title.

Drug means any substance (other than alcohol) that has known mind- or function-altering effects on a human subject, specifically including any psychoactive substance and including, but not limited to, controlled substances.

FRA means the Federal Railroad Administration, United States Department of Transportation.

FRA representative means the Associate Administrator for Safety of FRA, the Associate Administrator's delegate (including a qualified State inspector acting under Part 212 of this chapter), the Chief Counsel of FRA, or the Chief Counsel's delegate.

Hazardous material means a commodity designated as a hazardous material by Part 172 of this title.

Impact accident means a train accident (i.e., a rail equipment accident involving damage in excess of the current reporting threshold (see § 225.19(e) of this chapter)) consisting of a head-on collision, a rear-end collision, a side collision (including a collision at a railroad crossing at grade), a switching collision, or impact with a deliberately-placed obstruction such as a bumping post. The following are not impact accidents:

(1) An accident in which the derailment of equipment causes an impact with other rail equipment;

(2) Impact of rail equipment with obstructions such as fallen trees, rock or snow slides, livestock, etc.; and

(3) Raking collisions caused by derailment of rolling stock or operation of equipment in violation of clearance limitations.

Independent with respect to a medical facility, means not under the ownership or control of the railroad and not operated or staffed by a salaried officer or employee of the railroad. The fact that the railroad pays for services rendered by a medical facility or laboratory, selects that entity for performing tests under this part, or has a standing contractual relationship with that entity to perform tests under this part or perform other medical examinations or tests of railroad employees does not, by itself, remove the facility from this definition.

Medical facility means a hospital, clinic, physician's office, or laboratory where toxicological specimens can be collected according to recognized professional standards.

Medical practitioner means a physician or dentist licensed or otherwise authorized to practice by the state.

NTSB means the National Transportation Safety Board.

Passenger train means a train transporting persons (other than employees, contractors, or persons riding equipment to observe or monitor railroad operations) in intercity passenger service, commuter or other short-haul service, or for excursion or recreational purposes.

Positive rate means the number of positive results for random drug tests conducted under this part plus the number of refusals of random tests required by this part, divided by the total number of random drug tests conducted under this part plus the number of refusals of random tests required by this part.

Possess means to have on one's person or in one's personal effects or under one's control. However, the concept of possession as used in this part does not include control by virtue of presence in the employee's personal residence or other similar location off of railroad property.

Railroad means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, and any person providing such transportation, including—

(1) Commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

Railroad property damage or *damage to railroad property* refers to damage to railroad property, including railroad on-track equipment, signals, track, track structures (including bridges and tunnels), or roadbed, including labor costs and all other costs for repair or replacement in kind. Estimated cost for replacement of railroad property must be calculated as described in the FRA Guide for Preparing Accident/Incident Reports. (See § 225.21 of this chapter.) However, replacement of passenger equipment is calculated based on the cost of acquiring a new unit for comparable service.

Reportable injury means an injury reportable under Part 225 of this chapter.

Reporting threshold means the amount specified in § 225.19(e) of this chapter, as adjusted from time to time in accordance with Appendix B to Part 225 of this chapter.

Supervisory employee means an officer, special agent, or other employee of the railroad who is not a co-worker and who is responsible for supervising or monitoring the conduct or performance of one or more employees.

Train, except as context requires, means a locomotive, or more than one locomotive coupled, with or without cars. (A locomotive is a self-propelled unit of equipment which can be used in train service.)

Train accident means a passenger, freight, or work train accident described in § 225.19(c) of this chapter (a ''rail equipment accident'' involving damage in excess of the current reporting threshold), including an accident involving a switching movement.

Train incident means an event involving the movement of railroad on-track equipment that results in a casualty but in which railroad property damage does not exceed the reporting threshold.

Violation rate means the number of covered employees (as reported under § 219.801) found during random tests given under this part to have an alcohol concentration of .04 or greater, plus the number of employees who refuse a random test required by this part, divided by the total reported number of employees in the industry given random alcohol tests under this part plus the total reported number of employees in the industry who refuse a random test required by this part.

§ 219.7 Waivers.

(a) A person subject to a requirement of this part may petition the FRA for a waiver of compliance with such requirement.

(b) Each petition for waiver under this section must be filed in a manner and contain the information required by Part 211 of this chapter. A petition for waiver of the Part 40 prohibition against stand down of an employee before the Medical Review Officer has completed the verification must also comply with § 40.21 of this title.

(c) If the FRA Administrator finds that waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any necessary conditions.

§ 219.9 Responsibility for compliance.

(a) Any person (an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: A railroad;

a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $500 and not more than $11,000 per violation, except that: Penalties may be assessed against individuals only for willful violations; where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury, or has caused death or injury, a penalty not to exceed $22,000 per violation may be assessed; and the standard of liability for a railroad will vary depending upon the requirement involved. See, e.g., § 219.105, which must be construed to qualify the responsibility of a railroad for the unauthorized conduct of an employee that violates § 219.101 or § 219.102 (while imposing a duty of due diligence to prevent such conduct). Each day a violation continues constitutes a separate offense. See Appendix A to this part for a statement of agency civil penalty policy.

(b)(1) In the case of joint operations, primary responsibility for compliance with this part with respect to determination of events qualifying for breath or body fluid testing under Subparts C and D of this part rests with the host railroad, and all affected employees must be responsive to direction from the host railroad consistent with this part. However, nothing in this paragraph (b)(1) restricts the ability of the railroads to provide for an appropriate assignment of responsibility for compliance with this part as among those railroads through a joint operating agreement or other binding contract. FRA reserves the right to bring an enforcement action for noncompliance with applicable portions of this part against the host railroad, the employing railroad, or both.

(2) Where an employee of one railroad is required to participate in breath or body fluid testing under Subpart C or D of this part and is subsequently subject to adverse action alleged to have arisen out of the required test (or alleged refusal thereof), necessary witnesses and documents available to the other railroad must be made available to the employee on a reasonable basis.

(c) Any independent contractor or other entity that performs covered service for a railroad has the same responsibilities as a railroad under this part, with respect to its employees who perform covered service. The entity's responsibility for compliance with this part may be fulfilled either directly by that entity or by the railroad's treating the entity's employees who perform covered service as if they were its own employees for purposes of this part. The responsibility for compliance must be clearly spelled out in the contract between the railroad and the other entity or in another document. In the absence of such a clear delineation of responsibility, FRA will hold the railroad and the other entity jointly and severally liable for compliance.

§ 219.11 General conditions for chemical tests.

(a) Any employee who performs covered service for a railroad is deemed to have consented to testing as required in subparts B, C, D, and G of this part; and consent is implied by performance of such service.

(b)(1) Each such employee must participate in such testing, as required under the conditions set forth in this part by a representative of the railroad.

(2) In any case where an employee has sustained a personal injury and is subject to alcohol or drug testing under this part, necessary medical treatment must be accorded priority over provision of the breath or body fluid specimen(s).

(3) Failure to remain available following an accident or casualty as required by company rules (i.e., being absent without leave) is considered a refusal to participate in testing, without regard to any subsequent provision of specimens.

(c) A covered employee who is required to be tested under subpart C or D of this part and who is taken to a medical facility for observation or treatment after an accident or incident is deemed to have consented to the release to FRA of the following:

(1) The remaining portion of any body fluid specimen taken by the treating facility within 12 hours of the accident or incident that is not required for medical purposes, together with any normal medical facility record(s) pertaining to the taking of such specimen;

(2) The results of any laboratory tests for alcohol or any drug conducted by or for the treating facility on such specimen;

(3) The identity, dosage, and time of administration of any drugs administered by the treating facility prior to the time specimens were taken by the treating facility or prior to the time specimens were taken in compliance with this part; and

(4) The results of any breath tests for alcohol conducted by or for the treating facility.

(d) An employee required to participate in body fluid testing under subpart C of this part (post-accident toxicological testing) or testing subject to subpart H of this part shall, if requested by the representative of the railroad or the medical facility (including, under subpart H of this part, a non-medical contract collector), evidence consent to taking of specimens, their release for toxicological analysis under pertinent provisions of this part, and release of the test results to the railroad's Medical Review Officer by promptly executing a consent form, if required by the medical facility. The employee is not required to execute any document or clause waiving rights that the employee would otherwise have against the employer, and any such waiver is void. The employee may not be required to waive liability with respect to negligence on the part of any person participating in the collection, handling or analysis of the specimen or to indemnify any person for the negligence of others. Any consent provided consistent with this section may be construed to extend only to those actions specified in this section.

(e) Nothing in this part may be construed to authorize the use of physical coercion or any other deprivation of liberty in order to compel breath or body fluid testing.

(f) Any railroad employee who performs service for a railroad is deemed to have consented to removal of body fluid and/or tissue specimens necessary for toxicological analysis from the remains of such employee, if such employee dies within 12 hours of an accident or incident described in subpart C of this part as a result of such event. This consent is specifically required of employees not in covered service, as well as employees in covered service.

(g) Each supervisor responsible for covered employees (except a working supervisor within the definition of co-worker under this part) must be trained in the signs and symptoms of alcohol and drug influence, intoxication and misuse consistent with a program of instruction to be made available for inspection upon demand by FRA. Such a program shall, at a minimum, provide information concerning the acute behavioral and apparent physiological effects of alcohol and the major drug groups on the controlled substances list. The program must also provide training on the qualifying criteria for post-accident testing contained in subpart C of this part, and the role of the

supervisor in post-accident collections described in subpart C and Appendix C of this part. The duration of such training may not be less than 3 hours.

(h) Nothing in this subpart restricts any discretion available to the railroad to request or require that an employee cooperate in additional body fluid testing. However, no such testing may be performed on urine or blood specimens provided under this part. For purposes of this paragraph (h), all urine from a void constitutes a single specimen.

§ 219.13 Preemptive effect.

(a) Under section 20106 of title 49, United States Code, issuance of the regulations in this part preempts any State law, rule, regulation, order or standard covering the same subject matter, except a provision directed at a local hazard that is consistent with this part and that does not impose an undue burden on interstate commerce.

(b) FRA does not intend by issuance of the regulations in this part to preempt provisions of State criminal law that impose sanctions for reckless conduct that leads to actual loss of life, injury or damage to property, whether such provisions apply specifically to railroad employees or generally to the public at large.

§ 219.15 [Reserved]

§ 219.17 Construction.

Nothing in this part—

(a) Restricts the power of FRA to conduct investigations under sections 20107, 20108, 20111, and 20112 of title 49, United States Code; or

(b) Creates a private right of action on the part of any person for enforcement of the provisions of this part or for damages resulting from noncompliance with this part.

§ 219.19 [Reserved]

§ 219.21 Information collection.

(a) The information collection requirements of this part have been reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB control number 2130–0526.

(b) The information collection requirements are found in the following sections: 219.7, 219.23, 219.104, 219.201, 219.203, 219.205, 219.207, 219.209, 219.211, 219.213, 219.303, 219.401, 219.403, 219.405, 219.407, 219.501, 219.502, 219.503, 219.601, 219.605, 219.701, 219.801, 219.803, 219.901, and 219.903.

§ 219.23 Railroad policies.

(a) Whenever a breath or body fluid test is required of an employee under this part, the railroad must provide clear and unequivocal written notice to the employee that the test is being required under FRA regulations. Use of the mandated DOT form for drug or alcohol testing satisfies the requirements of this paragraph (a).

(b) Whenever a breath or body fluid test is required of an employee under this part, the railroad must provide clear, unequivocal written notice of the basis or bases upon which the test is required (e.g., reasonable suspicion, violation of a specified operating/safety rule enumerated in subpart D of this part, random selection, follow-up, etc.). Completion of the DOT alcohol or drug testing form indicating the basis of the test (prior to providing a copy to the employee) satisfies the requirement of this paragraph (b). Use of the DOT form for non-Federal tests is prohibited.

(c) Use of approved forms for mandatory post-accident toxicological testing under subpart C of this part provides the notifications required under this section with respect to such tests. Use of those forms for any other test is prohibited.

(d) Each railroad must provide educational materials that explain the requirements of this part, and the railroad's policies and procedures with respect to meeting those requirements.

(1) The railroad must ensure that a copy of these materials is distributed to each covered employee prior to the start of alcohol testing under the railroad's alcohol misuse prevention program and to each person subsequently hired for or transferred to a covered position.

(2) Each railroad must provide written notice to representatives of employee organizations of the availability of this information.

(e) *Required content.* The materials to be made available to employees must include detailed discussion of at least the following:

(1) The identity of the person designated by the railroad to answer employee questions about the materials.

(2) The classes or crafts of employees who are subject to the provisions of this part.

(3) Sufficient information about the safety-sensitive functions performed by those employees to make clear that the period of the work day the covered employee is required to be in compliance with this part is that period when the employee is on duty and is required to perform or is available to perform covered service.

(4) Specific information concerning employee conduct that is prohibited under subpart B of this part.

(5) In the case of a railroad utilizing the accident/incident and rule violation reasonable cause testing authority provided by this part, prior notice (which may be combined with the notice required by §§ 219.601(d)(1) and 219.607(d)(1)), to covered employees of the circumstances under which they will be subject to testing.

(6) The circumstances under which a covered employee will be tested under this part.

(7) The procedures that will be used to test for the presence of alcohol and controlled substances, protect the employee and the integrity of the testing processes, safeguard the validity of the test results, and ensure that those results are attributed to the correct employee.

(8) The requirement that a covered employee submit to alcohol and drug tests administered in accordance with this part.

(9) An explanation of what constitutes a refusal to submit to an alcohol or drug test and the attendant consequences.

(10) The consequences for covered employees found to have violated Subpart B of this part, including the requirement that the employee be removed immediately from covered service, and the procedures under § 219.104.

(11) The consequences for covered employees found to have an alcohol concentration of .02 or greater but less than .04.

(12) Information concerning the effects of alcohol misuse on an individual's health, work, and personal life; signs and symptoms of an alcohol problem (the employee's or a coworker's); and available methods of evaluating and resolving problems associated with the misuse of alcohol, including utilization of the procedures set forth in subpart E of this part and the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

(f) *Optional provisions.* The materials supplied to employees may also include information on additional railroad policies with respect to the use or possession of alcohol and drugs, including any consequences for an employee found to have a specific alcohol concentration, that are based on the railroad's authority independent of this part. Any such additional policies or consequences must be clearly and obviously described as being based on independent authority.

Subpart B—Prohibitions

§ 219.101 Alcohol and drug use prohibited.

(a) *Prohibitions.* Except as provided in § 219.103—

(1) No employee may use or possess alcohol or any controlled substance while assigned by a railroad to perform covered service.

(2) No employee may report for covered service, or go or remain on duty in covered service while—

(i) Under the influence of or impaired by alcohol;

(ii) Having .04 or more alcohol concentration in the breath or blood; or

(iii) Under the influence of or impaired by any controlled substance.

(3) No employee may use alcohol for whichever is the lesser of the following periods:

(i) Within four hours of reporting for covered service; or

(ii) After receiving notice to report for covered service.

(4) No employee tested under the provisions of this part whose test result indicates an alcohol concentration of .02 or greater but less than .04 may perform or continue to perform covered service functions for a railroad, nor may a railroad permit the employee to perform or continue to perform covered service, until the start of the employee's next regularly scheduled duty period, but not less than eight hours following administration of the test.

(5) If an employee tested under the provisions of this part has a test result indicating an alcohol concentration below 0.02, the test must be considered negative and is not evidence of alcohol misuse. A railroad may not use a federal test result below 0.02 either as evidence in a company proceeding or as a basis for subsequent testing under company authority. A railroad may take further action to compel cooperation in other breath or body fluid testing only if it has an independent basis for doing so.

(b) *Controlled substance.* ''Controlled substance'' is defined by § 219.5. Controlled substances are grouped as follows: marijuana, narcotics (such as heroin and codeine), stimulants (such as cocaine and amphetamines), depressants (such as barbiturates and minor tranquilizers), and hallucinogens (such as the drugs known as PCP and LSD). Controlled substances include illicit drugs (Schedule I), drugs that are required to be distributed only by a medical practitioner's prescription or other authorization (Schedules II through IV, and some drugs on Schedule V), and certain preparations for which distribution is through documented over the counter sales (Schedule V only).

(c) *Railroad rules.* Nothing in this section restricts a railroad from imposing an absolute prohibition on the presence of alcohol or any drug in the body fluids of persons in its employ, whether in furtherance of the purpose of this part or for other purposes.

(d) *Construction.* This section may not be construed to prohibit the presence of an unopened container of an alcoholic beverage in a private motor vehicle that is not subject to use in the business of the railroad; nor may it be construed to restrict a railroad from prohibiting such presence under its own rules.

§ 219.102 Prohibition on abuse of controlled substances.

No employee who performs covered service may use a controlled substance at any time, whether on duty or off duty, except as permitted by § 219.103.

§ 219.103 Prescribed and over-the-counter drugs.

(a) This subpart does not prohibit the use of a controlled substance (on Schedules II through V of the controlled substance list) prescribed or authorized by a medical practitioner, or possession incident to such use, if—

(1) The treating medical practitioner or a physician designated by the railroad has made a good faith judgment, with notice of the employee's assigned duties and on the basis of the available medical history, that use of the substance by the employee at the prescribed or authorized dosage level is consistent with the safe performance of the employee's duties;

(2) The substance is used at the dosage prescribed or authorized; and

(3) In the event the employee is being treated by more than one medical practitioner, at least one treating medical practitioner has been informed of all medications authorized or prescribed and has determined that use of the medications is consistent with the safe performance of the employee's duties (and the employee has observed any restrictions imposed with respect to use of the medications in combination).

(b) This subpart does not restrict any discretion available to the railroad to require that employees notify the railroad of therapeutic drug use or obtain prior approval for such use.

§ 219.104 Responsive action.

(a) *Removal from covered service.* (1) If the railroad determines that an employee has violated § 219.101 or § 219.102, or the alcohol or controlled substances misuse rule of another DOT agency, the railroad must immediately remove the employee from covered service and the procedures described in paragraphs (b) through (e) of this section apply.

(2) If an employee refuses to provide breath or a body fluid specimen or specimens when required to by the railroad under a mandatory provision of this part, the railroad must immediately remove the employee from covered service, and the procedures described in paragraphs (b) through (e) of this section apply.

(3)(i) This section does not apply to actions based on breath or body fluid tests for alcohol or drugs that are conducted exclusively under authority other than that provided in this part (e.g., testing under a company medical policy, for-cause testing policy wholly independent of subpart D of this part, or testing under a labor agreement).

(ii) This section and the information requirements listed in § 219.23 do not apply to applicants who refuse to submit to a pre-employment test or who have a pre-employment test with a result indicating the misuse of alcohol or controlled substances.

(b) *Notice.* Prior to or upon withdrawing the employee from covered service under this section, the railroad must provide notice to the employee of the reason for this action.

(c) *Hearing procedures.* (1) If the employee denies that the test result is valid evidence of alcohol or drug use prohibited by this subpart, the employee may demand and must be provided an opportunity for a prompt post-suspension hearing before a presiding officer other than the charging official. This hearing may be consolidated with any disciplinary hearing arising from the same accident or incident (or conduct directly related thereto), but the presiding officer must make separate findings as to compliance with §§ 219.101 and 219.102.

(2) The hearing must be convened within the period specified in the applicable collective bargaining agreement. In the absence of an agreement provision, the employee may demand that the hearing be convened within 10 calendar days of the suspension or, in the case of an employee who is unavailable due to injury, illness, or other sufficient cause, within 10 days of the date the employee becomes available for hearing.

(3) A post-suspension proceeding conforming to the requirements of an applicable collective bargaining agreement, together with the provisions for adjustment of disputes under sec. 3 of the Railway Labor Act (49 U.S.C. 153), satisfies the procedural requirements of this paragraph (c).

(4) Nothing in this part may be deemed to abridge any additional

procedural rights or remedies not inconsistent with this part that are available to the employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law with respect to the removal or other adverse action taken as a consequence of a positive test result in a test authorized or required by this part.

(5) Nothing in this part restricts the discretion of the railroad to treat an employee's denial of prohibited alcohol or drug use as a waiver of any privilege the employee would otherwise enjoy to have such prohibited alcohol or drug use treated as a non-disciplinary matter or to have discipline held in abeyance.

(d) The railroad must comply with the return-to-service and follow-up testing requirements, and the Substance Abuse Professional conflict-of-interest prohibitions, contained in §§ 40.305, 40.307, and 40.299 of this title, respectively.

§ 219.105 Railroad's duty to prevent violations.

(a) A railroad may not, with actual knowledge, permit an employee to go or remain on duty in covered service in violation of the prohibitions of § 219.101 or § 219.102. As used in this section, the knowledge imputed to the railroad must be limited to that of a railroad management employee (such as a supervisor deemed an ''officer,'' whether or not such person is a corporate officer) or a supervisory employee in the offending employee's chain of command.

(b) A railroad must exercise due diligence to assure compliance with §§ 219.101 and 219.102 by each covered employee.

§ 219.107 Consequences of unlawful refusal.

(a) An employee who refuses to provide breath or a body fluid specimen or specimens when required to by the railroad under a mandatory provision of this part must be deemed disqualified for a period of nine (9) months.

(b) Prior to or upon withdrawing the employee from covered service under this section, the railroad must provide notice of the reason for this action, and the procedures described in § 219.104(c) apply.

(c) The disqualification required by this section applies with respect to employment in covered service by any railroad with notice of such disqualification.

(d) The requirement of disqualification for nine (9) months does not limit any discretion on the part of the railroad to impose additional sanctions for the same or related conduct.

(e) Upon the expiration of the 9-month period described in this section, a railroad may permit the employee to return to covered service only under the same conditions specified in § 219.104(d), and the employee must be subject to follow-up tests, as provided by that section.

Subpart C—Post-Accident Toxicological Testing

§ 219.201 Events for which testing is required.

(a) *List of events.* Except as provided in paragraph (b) of this section, post-accident toxicological tests must be conducted after any event that involves one or more of the circumstances described in paragraphs (a)(1) through (4) of this section:

(1) *Major train accident.* Any train accident (i.e., a rail equipment accident involving damage in excess of the current reporting threshold) that involves one or more of the following:

(i) A fatality;

(ii) A release of hazardous material lading from railroad equipment accompanied by—

(A) An evacuation; or

(B) A reportable injury resulting from the hazardous material release (e.g., from fire, explosion, inhalation, or skin contact with the material); or

(iii) Damage to railroad property of $1,000,000 or more.

(2) *Impact accident.* An impact accident (i.e., a rail equipment accident defined as an ''impact accident'' in § 219.5) that involves damage in excess of the current reporting threshold, resulting in—

(i) A reportable injury; or

(ii) Damage to railroad property of $150,000 or more.

(3) *Fatal train incident.* Any train incident that involves a fatality to any on-duty railroad employee.

(4) *Passenger train accident.* Reportable injury to any person in a train accident (i.e., a rail equipment accident involving damage in excess of the current reporting threshold) involving a passenger train.

(b) *Exceptions.* No test may be required in the case of a collision between railroad rolling stock and a motor vehicle or other highway conveyance at a rail/highway grade crossing. No test may be required in the case of an accident/incident the cause and severity of which are wholly attributable to a natural cause (e.g., flood, tornado, or other natural disaster) or to vandalism or trespasser(s), as determined on the basis of objective and documented facts by the railroad representative responding to the scene.

(c) *Good faith determinations.* (1)(i) The railroad representative responding to the scene of the accident/incident must determine whether the accident/incident falls within the requirements of paragraph (a) of this section or is within the exception described in paragraph (b) of this section. It is the duty of the railroad representative to make reasonable inquiry into the facts as necessary to make such determinations. In making such inquiry, the railroad representative must consider the need to obtain specimens as soon as practical in order to determine the presence or absence of impairing substances reasonably contemporaneous with the accident/incident. The railroad representative satisfies the requirement of this section if, after making reasonable inquiry, the representative exercises good faith judgement in making the required determinations.

(ii) The railroad representative making the determinations required by this section may not be a person directly involved in the accident/incident. This section does not prohibit consultation between the responding railroad representative and higher level railroad officials; however, the responding railroad representative must make the factual determinations required by this section.

(iii) Upon specific request made to the railroad by the Associate Administrator for Safety, FRA (or the Associate Administrator's delegate), the railroad must provide a report describing any decision by a person other than the responding railroad representative with respect to whether an accident/incident qualifies for testing. This report must be affirmed by the decision maker and must be provided to FRA within 72 hours of the request. The report must include the facts reported by the responding railroad representative, the basis upon which the testing decision was made, and the person making the decision.

(iv) Any estimates of railroad property damage made by persons not at the scene must be based on descriptions of specific physical damage provided by the on-scene railroad representative.

(v) In the case of an accident involving passenger equipment, a host railroad may rely upon the damage estimates provided by the passenger railroad (whether present on scene or not) in making the decision whether testing is required, subject to the same requirement that visible physical damage be specifically described.

(2) A railroad must not require an employee to provide blood or urine

specimens under the authority or procedures of this subject unless the railroad has made the determinations required by this section, based upon reasonable inquiry and good faith judgment. A railroad does not act in excess of its authority under this subpart if its representative has made such reasonable inquiry and exercised such good faith judgment, but it is later determined, after investigation, that one or more of the conditions thought to have required testing were not, in fact, present. However, this section does not excuse the railroad for any error arising from a mistake of law (e.g., application of testing criteria other than those contained in this part).

(3) A railroad is not in violation of this subpart if its representative has made such reasonable inquiry and exercised such good faith judgment but nevertheless errs in determining that post-accident testing is not required.

(4) An accident/incident with respect to which the railroad has made reasonable inquiry and exercised good faith judgment in determining the facts necessary to apply the criteria contained in paragraph (a) of this section is deemed a qualifying event for purposes of specimen analysis, reporting, and other purposes.

(5) In the event specimens are collected following an event determined by FRA not to be a qualifying event within the meaning of this section, FRA directs its designated laboratory to destroy any specimen material submitted and to refrain from disclosing to any person the results of any analysis conducted.

§ 219.203 Responsibilities of railroads and employees.

(a) *Employees tested.* (1)(i) Following each accident and incident described in § 219.201, the railroad (or railroads) must take all practicable steps to assure that all covered employees of the railroad directly involved in the accident or incident provide blood and urine specimens for toxicological testing by FRA. Such employees must cooperate in the provision of specimens as described in this part and Appendix C to this part.

(ii) If the conditions for mandatory toxicological testing exist, the railroad may also require employees to provide breath for testing in accordance with the procedures set forth in part 40 of this title and in this part, if such testing does not interfere with timely collection of required specimens.

(2) Such employees must specifically include each and every operating employee assigned as a crew member of any train involved in the accident or incident. In any case where an operator, dispatcher, signal maintainer or other covered employee is directly and contemporaneously involved in the circumstances of the accident/incident, those employees must also be required to provide specimens.

(3) An employee must be excluded from testing under the following circumstances: In any case of an accident/incident for which testing is mandated only under § 219.201(a)(2) (an ''impact accident''), § 219.201(a)(3) (''fatal train incident''), or § 219.201(a)(4) (a ''passenger train accident with injury'') if the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause(s) or severity of the accident/incident. The railroad representative must consider any such information immediately available at the time the qualifying event determination is made under § 219.201.

(4) The following provisions govern accidents/incidents involving non-covered employees:

(i) Surviving non-covered employees are not subject to testing under this subpart.

(ii) Testing of the remains of non-covered employees who are fatally injured in train accidents and incidents is required.

(b) *Timely specimen collection.* (1) The railroad must make every reasonable effort to assure that specimens are provided as soon as possible after the accident or incident.

(2) This paragraph (b) must not be construed to inhibit the employees required to be tested from performing, in the immediate aftermath of the accident or incident, any duties that may be necessary for the preservation of life or property. However, where practical, the railroad must utilize other employees to perform such duties.

(3) In the case of a passenger train which is in proper condition to continue to the next station or its destination after an accident or incident, the railroad must consider the safety and convenience of passengers in determining whether the crew is immediately available for testing. A relief crew must be called to relieve the train crew as soon as possible.

(4) Covered employees who may be subject to testing under this subpart must be retained in duty status for the period necessary to make the determinations required by § 219.201 and this section and (as appropriate) to complete the specimen collection procedure. An employee may not be recalled for testing under this subpart if that employee has been released from duty under the normal procedures of the railroad, except that an employee may be immediately recalled for testing if—

(i) The employee could not be retained in duty status because the employee went off duty under normal carrier procedures prior to being contacted by a railroad supervisor and instructed to remain on duty pending completion of the required determinations (e.g., in the case of a dispatcher or signal maintainer remote from the scene of an accident who was unaware of the occurrence at the time the employee went off duty);

(ii) The railroad's preliminary investigation (contemporaneous with the determination required by § 219.201) indicates a clear probability that the employee played a major role in the cause or severity of the accident/incident; and

(iii) The accident/incident actually occurred during the employee's duty tour. An employee who has been transported to receive medical care is not released from duty for purposes of this section. Nothing in this section prohibits the subsequent testing of an employee who has failed to remain available for testing as required (i.e., who is absent without leave); but subsequent testing does not excuse such refusal by the employee timely to provide the required specimens.

(c) *Place of specimen collection.* (1) Employees must be transported to an independent medical facility where the specimens must be obtained. The railroad must pre-designate for such testing one or more such facilities in reasonable proximity to any location where the railroad conducts operations. Designation must be made on the basis of the willingness of the facility to conduct specimen collection and the ability of the facility to complete specimen collection promptly, professionally, and in accordance with pertinent requirements of this part. In all cases blood may be drawn only by a qualified medical professional or by a qualified technician subject to the supervision of a qualified medical professional.

(2) In the case of an injured employee, the railroad must request the treating medical facility to obtain the specimens.

(d) *Obtaining cooperation of facility.* (1) In seeking the cooperation of a medical facility in obtaining a specimen under this subpart, the railroad shall, as necessary, make specific reference to the requirements of this subpart.

(2) If an injured employee is unconscious or otherwise unable to evidence consent to the procedure and the treating medical facility declines to obtain blood specimens after having

been acquainted with the requirements of this subpart, the railroad must immediately notify the duty officer at the National Response Center (NRC) at (800) 424–8801 or (800) 424–8802, stating the employee's name, the medical facility, its location, the name of the appropriate decisional authority at the medical facility, and the telephone number at which that person can be reached. FRA will then take appropriate measures to assist in obtaining the required specimen.

(e) *Discretion of physician.* Nothing in this subpart may be construed to limit the discretion of a physician to determine whether drawing a blood specimen is consistent with the health of an injured employee or an employee afflicted by any other condition that may preclude drawing the specified quantity of blood.

§ 219.205 Specimen collection and handling.

(a) *General.* Urine and blood specimens must be obtained, marked, preserved, handled, and made available to FRA consistent with the requirements of this subpart, and the technical specifications set forth in Appendix C to this part.

(b) *Information requirements.* In order to process specimens, analyze the significance of laboratory findings, and notify the railroads and employees of test results, it is necessary to obtain basic information concerning the accident/incident and any treatment administered after the accident/incident. Accordingly, the railroad representative must complete the information required by Form FRA 6180.73 (revised) for shipping with the specimens. Each employee subject to testing must cooperate in completion of the required information on Form FRA F 6180.74 (revised) for inclusion in the shipping kit and processing of the specimens. The railroad representative must request an appropriate representative of the medical facility to complete the remaining portion of the information on each Form 6180.74. One Form 6180.73 must be forwarded in the shipping kit with each group of specimens. One Form 6180.74 must be forwarded in the shipping kit for each employee who provides specimens. Forms 6180.73 and 6180.74 may be ordered from the laboratory specified in Appendix B to this part; the forms are also provided to railroads free of charge in the shipping kit. (See paragraph (c) of this section.)

(c) *Shipping kit.* (1) FRA and the laboratory designated in Appendix B to this part make available for purchase a limited number of standard shipping kits for the purpose of routine handling of toxicological specimens under this subpart. Whenever possible, specimens must be placed in the shipping kit prepared for shipment according to the instructions provided in the kit and Appendix C to this part.

(2) Kits may be ordered directly from the laboratory designated in Appendix B to this part.

(3) FRA maintains a limited number of kits at its field offices. A Class III railroad may utilize kits in FRA's possession, rather than maintaining such kits on its property.

(d) *Shipment.* Specimens must be shipped as soon as possible by pre-paid air express or air freight (or other means adequate to ensure delivery within twenty-four (24) hours from time of shipment) to the laboratory designated in Appendix B to this part. Where express courier pickup is available, the railroad must request the medical facility to transfer the sealed toxicology kit directly to the express courier for transportation. If courier pickup is not available at the medical facility where the specimens are collected or for any other reason prompt transfer by the medical facility cannot be assured, the railroad must promptly transport the sealed shipping kit holding the specimens to the most expeditious point of shipment via air express, air freight or equivalent means. The railroad must maintain and document secure chain of custody of the kit from release by the medical facility to delivery for transportation, as described in Appendix C to this part.

§ 219.206 FRA access to breath test results.

Documentation of breath test results must be made available to FRA consistent with the requirements of this subpart, and the technical specifications set forth in Appendix C to this part.

§ 219.207 Fatality.

(a) In the case of an employee fatality in an accident or incident described in § 219.201, body fluid and/or tissue specimens must be obtained from the remains of the employee for toxicological testing. To ensure that specimens are timely collected, the railroad must immediately notify the appropriate local authority (such as a coroner or medical examiner) of the fatality and the requirements of this subpart, making available the shipping kit and requesting the local authority to assist in obtaining the necessary body fluid or tissue specimens. The railroad must also seek the assistance of the custodian of the remains, if a person other than the local authority.

(b) If the local authority or custodian of the remains declines to cooperate in obtaining the necessary specimens, the railroad must immediately notify the duty officer at the National Response Center (NRC) at (800) 424–8801 or (800) 424–8802 by providing the following information:

(1) Date and location of the accident or incident;

(2) Railroad;

(3) Name of the deceased;

(4) Name and telephone number of custodian of the remains; and

(5) Name and telephone number of local authority contacted.

(c) A coroner, medical examiner, pathologist, Aviation Medical Examiner, or other qualified professional is authorized to remove the required body fluid and/or tissue specimens from the remains on request of the railroad or FRA pursuant to this part; and, in so acting, such person is the delegate of the FRA Administrator under sections 20107 and 20108 of title 49, United States Code (but not the agent of the Secretary for purposes of the Federal Tort Claims Act (chapter 171 of title 28, United States Code). Such qualified professional may rely upon the representations of the railroad or FRA representative with respect to the occurrence of the event requiring that toxicological tests be conducted and the coverage of the deceased employee under this part.

(d) Appendix C to this part specifies body fluid and tissue specimens required for toxicological analysis in the case of a fatality.

§ 219.209 Reports of tests and refusals.

(a)(1) A railroad that has experienced one or more events for which specimens were obtained must provide prompt telephonic notification summarizing such events. Notification must immediately be provided to the duty officer at the National Response Center (NRC) at (800) 424–8802 and to the Office of Safety, FRA, at (202) 493–6313.

(2) Each telephonic report must contain:

(i) Name of railroad;

(ii) Name, title and telephone number of person making the report;

(iii) Time, date and location of the accident/incident;

(iv) Brief summary of the circumstances of the accident/incident, including basis for testing; and

(v) Number, names and occupations of employees tested.

(b) If the railroad is unable, as a result of non-cooperation of an employee or for any other reason, to obtain a specimen and cause it to be provided to FRA as required by this subpart, the

railroad must make a concise narrative report of the reason for such failure and, if appropriate, any action taken in response to the cause of such failure. This report must be appended to the report of the accident/incident required to be submitted under Part 225 of this chapter.

(c) If a test required by this section is not administered within four hours following the accident or incident, the railroad must prepare and maintain on file a record stating the reasons the test was not promptly administered. Records must be submitted to FRA upon request of the FRA Associate Administrator for Safety.

§ 219.211 Analysis and follow-up.

(a) The laboratory designated in Appendix B to this part undertakes prompt analysis of specimens provided under this subpart, consistent with the need to develop all relevant information and produce a complete report. Specimens are analyzed for alcohol and controlled substances specified by FRA under protocols specified by FRA, summarized in Appendix C to this part, which have been submitted to Health and Human Services for acceptance. Specimens may be analyzed for other impairing substances specified by FRA as necessary to the particular accident investigation.

(b) Results of post-accident toxicological testing under this subpart are reported to the railroad's Medical Review Officer and the employee. The MRO and the railroad must treat the test results and any information concerning medical use or administration of drugs provided under this subpart in the same confidential manner as if subject to subpart H of this part, except where publicly disclosed by FRA or the National Transportation Safety Board.

(c) With respect to a surviving employee, a test reported as positive for alcohol or a controlled substance by the designated laboratory must be reviewed by the railroad's Medical Review Officer with respect to any claim of use or administration of medications (consistent with § 219.103) that could account for the laboratory findings. The Medical Review Officer must promptly report the results of each review to the Associate Administrator for Safety, FRA, Washington, DC 20590. Such report must be in writing and must reference the employing railroad, accident/incident date, and location, and the envelope must be marked ''ADMINISTRATIVELY CONFIDENTIAL: ATTENTION ALCOHOL/DRUG PROGRAM MANAGER.'' The report must state whether the MRO reported the test result to the employing railroad as positive or negative and the basis of any determination that analytes detected by the laboratory derived from authorized use (including a statement of the compound prescribed, dosage/frequency, and any restrictions imposed by the authorized medical practitioner). Unless specifically requested by FRA in writing, the Medical Review Officer may not disclose to FRA the underlying physical condition for which any medication was authorized or administered. The FRA is not bound by the railroad Medical Review Officer's determination, but that determination will be considered by FRA in relation to the accident/incident investigation and with respect to any enforcement action under consideration.

(d) To the extent permitted by law, FRA treats test results indicating medical use of controlled substances consistent with § 219.103 (and other information concerning medically authorized drug use or administration provided incident to such testing) as administratively confidential and withholds public disclosure, except where it is necessary to consider this information in an accident investigation in relation to determination of probable cause. (However, as further provided in this section, FRA may provide results of testing under this subpart and supporting documentation to the National Transportation Safety Board.)

(e) An employee may respond in writing to the results of the test prior to the preparation of any final investigation report concerning the accident or incident. An employee wishing to respond may do so by letter addressed to the Alcohol/Drug Program Manager, Office of Safety, FRA, 400 Seventh Street, S.W., Washington, DC 20590 within 45 days of receipt of the test results. Any such submission must refer to the accident date, railroad and location, must state the position occupied by the employee on the date of the accident/incident, and must identify any information contained therein that the employee requests be withheld from public disclosure on grounds of personal privacy (but the decision whether to honor such request will be made by the FRA on the basis of controlling law).

(f)(1) The toxicology report may contain a statement of pharmacological significance to assist FRA and other parties in understanding the data reported. No such statement may be construed as a finding of probable cause in the accident or incident.

(2) The toxicology report is a part of the report of the accident/incident and therefore subject to the limitation of 49 U.S.C. 20903 (prohibiting use of the report for any purpose in a civil action for damages resulting from a matter mentioned in the report).

(g)(1) It is in the public interest to ensure that any railroad disciplinary actions that may result from accidents and incidents for which testing is required under this subpart are disposed of on the basis of the most complete and reliable information available so that responsive action will be appropriate. Therefore, during the interval between an accident or incident and the date that the railroad receives notification of the results of the toxicological analysis, any provision of collective bargaining agreements establishing maximum periods for charging employees with rule violations, or for holding an investigation, may not be deemed to run as to any offense involving the accident or incident (i.e., such periods must be tolled).

(2) This provision may not be construed to excuse the railroad from any obligation to timely charge an employee (or provide other actual notice) where the railroad obtains sufficient information relating to alcohol or drug use, impairment or possession or other rule violations prior to the receipt to toxicological analysis.

(3) This provision does not authorize holding any employee out of service pending receipt of toxicological analysis; nor does it restrict a railroad from taking such action in an appropriate case.

(h) Except as provided in § 219.201 (with respect to non-qualifying events), each specimen (including each split specimen) provided under this subpart is retained for not less than three months following the date of the accident or incident (two years from the date of the accident or incident in the case of a specimen testing positive for alcohol or a controlled substance). Post-mortem specimens may be made available to the National Transportation Safety Board (on request).

(i) An employee (donor) may, within 60 days of the date of the toxicology report, request that his or her split specimen be tested by the designated laboratory or by another laboratory certified by Health and Human Services under that Department's Guidelines for Federal Workplace Drug Testing Programs that has available an appropriate, validated assay for the fluid and compound declared positive. Since some analytes may deteriorate during storage, detected levels of the compound shall, as technically appropriate, be reported and considered corroborative of the original test result. Any request for a retest shall be in

writing, specify the railroad, accident date and location, be signed by the employee/donor, be addressed to the Associate Administrator for Safety, Federal Railroad Administration, Washington, DC 20590, and be designated ''ADMINISTRATIVELY CONFIDENTIAL: ATTENTION ALCOHOL/DRUG PROGRAM MANAGER.'' The expense of any employee-requested split specimen test at a laboratory other than the laboratory designated under this subpart shall be borne by the employee.

§ 219.213 Unlawful refusals; consequences.

(a) *Disqualification.* An employee who refuses to cooperate in providing breath, blood or urine specimens following an accident or incident specified in this subpart must be withdrawn from covered service and must be deemed disqualified for covered service for a period of nine (9) months in accordance with the conditions specified in § 219.107.

(b) *Procedures.* Prior to or upon withdrawing the employee from covered service under this section, the railroad must provide notice of the reason for this action and an opportunity for hearing before a presiding officer other than the charging official. The employee is entitled to the procedural protection set out in § 219.104(d).

(c) *Subject of hearing.* The hearing required by this section must determine whether the employee refused to submit to testing, having been requested to submit, under authority of this subpart, by a representative of the railroad. In determining whether a disqualification is required, the hearing official shall, as appropriate, also consider the following:

(1) Whether the railroad made a good faith determination, based on reasonable inquiry, that the accident or incident was within the mandatory testing requirements of this subpart; and

(2) In a case where a blood test was refused on the ground it would be inconsistent with the employee's health, whether such refusal was made in good faith and based on medical advice.

Subpart D—Testing for Cause

§ 219.300 Mandatory reasonable suspicion testing.

(a) *Requirements.* (1) A railroad must require a covered employee to submit to an alcohol test when the railroad has reasonable suspicion to believe that the employee has violated any prohibition of subpart B of this part concerning use of alcohol. The railroad's determination that reasonable suspicion exists to require the covered employee to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee.

(2) A railroad must require a covered employee to submit to a drug test when the railroad has reasonable suspicion to believe that the employee has violated the prohibitions of subpart B of this part concerning use of controlled substances. The railroad's determination that reasonable suspicion exists to require the covered employee to undergo a drug test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee. Such observations may include indications of the chronic and withdrawal effects of drugs.

(b)(1) With respect to an alcohol test, the required observations must be made by a supervisor trained in accordance with § 219.11(g). The supervisor who makes the determination that reasonable suspicion exists may not conduct testing on that employee.

(2) With respect to a drug test, the required observations must be made by two supervisors, at least one of whom is trained in accordance with § 219.11(g).

(c) Nothing in this section may be construed to require the conduct of alcohol testing or drug testing when the employee is apparently in need of immediate medical attention.

(d)(1) If a test required by this section is not administered within two hours following the determination under this section, the railroad must prepare and maintain on file a record stating the reasons the test was not properly administered. If a test required by this section is not administered within eight hours of the determination under this section, the railroad must cease attempts to administer an alcohol test and must state in the record the reasons for not administering the test. Records must be submitted to FRA upon request of the FRA Administrator.

(2) [Reserved]

§ 219.301 Testing for reasonable cause.

(a) *Authorization.* A railroad may, under the conditions specified in this subpart, require any covered employee, as a condition of employment in covered service, to cooperate in breath or body fluid testing, or both, to determine compliance with §§ 219.101 and 219.102 or a railroad rule implementing the requirements of §§ 219.101 and 219.102. This authority is limited to testing after observations or events that occur during duty hours (including any period of overtime or emergency service). The provisions of this subpart apply only when, and to the extent that, the test in question is conducted in reliance upon the authority conferred by this section. Section 219.23 prescribes the notice to an employee that is required when an employee is required to provide a breath or body fluid specimen under this part. A railroad may not require an employee to be tested under the authority of this subpart unless reasonable cause, as defined in this section, exists with respect to that employee.

(b) *For cause breath testing.* In addition to reasonable suspicion as described in § 219.300, the following circumstances constitute cause for the administration of alcohol tests under this section:

(1) [Reserved]

(2) *Accident/incident.* The employee has been involved in an accident or incident reportable under Part 225 of this chapter, and a supervisory employee of the railroad has a reasonable belief, based on specific, articulable facts, that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident; or

(3) *Rule violation.* The employee has been directly involved in one of the following operating rule violations or errors:

(i) Noncompliance with a train order, track warrant, timetable, signal indication, special instruction or other direction with respect to movement of a train that involves—

(A) Occupancy of a block or other segment of track to which entry was not authorized;

(B) Failure to clear a track to permit opposing or following movement to pass;

(C) Moving across a railroad crossing at grade without authorization; or

(D) Passing an absolute restrictive signal or passing a restrictive signal without stopping (if required);

(ii) Failure to protect a train as required by a rule consistent with § 218.37 of this chapter (including failure to protect a train that is fouling an adjacent track, where required by the railroad's rules);

(iii) Operation of a train at a speed that exceeds the maximum authorized speed by at least ten (10) miles per hour or by fifty percent (50%) of such maximum authorized speed, whichever is less;

(iv) Alignment of a switch in violation of a railroad rule, failure to align a switch as required for movement, operation of a switch under a train, or unauthorized running through a switch;

(v) Failure to apply or stop short of derail as required;

(vi) Failure to secure a hand brake or failure to secure sufficient hand brakes, as required;

(vii) Entering a crossover before both switches are lined for movement; or

(viii) In the case of a person performing a dispatching function or block operator function, issuance of a train order or establishment of a route that fails to provide proper protection for a train.

(c) *For cause drug testing.* In addition to reasonable suspicion as described in § 219.300, each of the conditions set forth in paragraphs (b)(2) (''accident/incident'') and (b)(3) (''rule violation'') of this section as constituting cause for alcohol testing also constitutes cause with respect to drug testing.

(d) [Reserved]

(e) *Limitation for subpart C events.* The compulsory drug testing authority conferred by this section does not apply with respect to any event subject to post-accident toxicological testing as required by § 219.201. However, use of compulsory breath test authority is authorized in any case where breath test results can be obtained in a timely manner at the scene of the accident and conduct of such tests does not materially impede the collection of specimens under Subpart C of this part.

§ 219.302 Prompt specimen collection; time limitation.

(a) Testing under this subpart may only be conducted promptly following the observations or events upon which the testing decision is based, consistent with the need to protect life and property.

(b) No employee may be required to participate in alcohol or drug testing under this section after the expiration of an eight-hour period from—

(1) The time of the observations or other events described in this section; or

(2) In the case of an accident/incident, the time a responsible railroad supervisor receives notice of the event providing reasonable cause for conduct of the test.

(c) An employee may not be tested under this subpart if that employee has been released from duty under the normal procedures of the railroad. An employee who has been transported to receive medical care is not released from duty for purposes of this section. Nothing in this section prohibits the subsequent testing of an employee who has failed to remain available for testing as required (i.e., who is absent without leave).

(d) As used in this subpart, a ''responsible railroad supervisor'' means any responsible line supervisor (e.g., a trainmaster or road foreman of engines) or superior official in authority over the employee to be tested.

(e) In the case of a drug test, the eight-hour requirement is satisfied if the employee has been delivered to the collection site (where the collector is present) and the request has been made to commence collection of the drug testing specimens within that period.

(f) [Reserved]

(g) Section 219.23 prescribes the notice to an employee that is required to provide breath or a body fluid specimen under this part.

Subpart E—Identification of Troubled Employees

§ 219.401 Requirement for policies.

(a) The purpose of this subpart is to prevent the use of alcohol and drugs in connection with covered service.

(b) Each railroad must adopt, publish and implement—

(1) A policy designed to encourage and facilitate the identification of those covered employees who abuse alcohol or drugs as a part of a treatable condition and to ensure that such employees are provided the opportunity to obtain counseling or treatment before those problems manifest themselves in detected violations of this part (hereafter ''voluntary referral policy''); and

(2) A policy designed to foster employee participation in preventing violations of this subpart and encourage co-worker participation in the direct enforcement of this part (hereafter ''co-worker report policy'').

(c) A railroad may comply with this subpart by adopting, publishing and implementing policies meeting the specific requirements of §§ 219.403 and 219.405 or by complying with § 219.407.

(d) If a railroad complies with this part by adopting, publishing and implementing policies consistent with §§ 219.403 and 219.405, the railroad must make such policies, and publications announcing such policies, available for inspection and copying by FRA.

(e) Nothing in this subpart may be construed to—

(1) Require payment of compensation for any period an employee is out of service under a voluntary referral or co-worker report policy;

(2) Require a railroad to adhere to a voluntary referral or co-worker report policy in a case where the referral or report is made for the purpose, or with the effect, of anticipating the imminent and probable detection of a rule violation by a supervising employee; or

(3) Limit the discretion of a railroad to dismiss or otherwise discipline an employee for specific rule violations or criminal offenses, except as specifically provided by this subpart.

§ 219.403 Voluntary referral policy.

(a) *Scope.* This section prescribes minimum standards for voluntary referral policies. Nothing in this section restricts a railroad from adopting, publishing and implementing a voluntary referral policy that affords more favorable conditions to employees troubled by alcohol or drug abuse problems, consistent with the railroad's responsibility to prevent violations of §§ 219.101 and 219.102.

(b) *Required provisions.* A voluntary referral policy must include the following provisions:

(1) A covered employee who is affected by an alcohol or drug use problem may maintain an employment relationship with the railroad if, before the employee is charged with conduct deemed by the railroad sufficient to warrant dismissal, the employee seeks assistance through the railroad for the employee's alcohol or drug use problem or is referred for such assistance by another employee or by a representative of the employee's collective bargaining unit. The railroad must specify whether, and under what circumstances, its policy provides for the acceptance of referrals from other sources, including (at the option of the railroad) supervisory employees.

(2) Except as may be provided under paragraph (c) of this section, the railroad treats the referral and subsequent handling, including counseling and treatment, as confidential.

(3) The railroad will, to the extent necessary for treatment and rehabilitation, grant the employee a leave of absence from the railroad for the period necessary to complete primary treatment and establish control over the employee's alcohol or drug problem. The policy must allow a leave of absence of not less than 45 days, if necessary for the purpose of meeting initial treatment needs.

(4) Except as may be provided under paragraph (c)(2) of this section, the employee will be returned to service on the recommendation of the substance abuse professional. Approval to return to service may not be unreasonably withheld.

(5) With respect to a certified locomotive engineer or a candidate for certification, the railroad must meet the requirements of § 240.119(e) of this chapter.

(c) *Optional provisions.* A voluntary referral policy may include any of the following provisions, at the option of the railroad:

(1) The policy may provide that the rule of confidentiality is waived if—

(i) The employee at any time refuses to cooperate in a recommended course of counseling or treatment; and/or

(ii) The employee is later determined, after investigation, to have been involved in an alcohol or drug-related disciplinary offense growing out of subsequent conduct.

(2) The policy may require successful completion of a return-to-service medical examination as a further condition on reinstatement in covered service.

(3) The policy may provide that it does not apply to an employee who has previously been assisted by the railroad under a policy or program substantially consistent with this section or who has previously elected to waive investigation under § 219.405 (co-worker report policy).

(4) The policy may provide that, in order to invoke its benefits, the employee must report to the contact designated by the railroad either:

(i) During non-duty hours (i.e., at a time when the employee is off duty); or

(ii) While unimpaired and otherwise in compliance with the railroad's alcohol and drug rules consistent with this subpart.

§ 219.405 Co-worker report policy.

(a) *Scope.* This section prescribes minimum standards for co-worker report policies. Nothing in this section restricts a railroad from adopting, publishing and implementing a policy that affords more favorable conditions to employees troubled by alcohol or drug abuse problems, consistent with the railroad's responsibility to prevent violations of §§ 219.101 and 219.102.

(b) *Employment relationship.* A co-worker report policy must provide that a covered employee may maintain an employment relationship with the railroad following an alleged first offense under this part or the railroad's alcohol and drug rules, subject to the conditions and procedures contained in this section.

(c) *General conditions and procedures.* (1) The alleged violation must come to the attention of the railroad as a result of a report by a co-worker that the employee was apparently unsafe to work with or was, or appeared to be, in violation of this part or the railroad's alcohol and drug rules.

(2) If the railroad representative determines that the employee is in violation, the railroad may immediately remove the employee from service in accordance with its existing policies and procedures.

(3) The employee must elect to waive investigation on the rule charge and must contact the substance abuse professional within a reasonable period specified by the policy.

(4) The substance abuse professional must schedule necessary interviews with the employee and complete an evaluation within 10 calendar days of the date on which the employee contacts the professional with a request for evaluation under the policy, unless it becomes necessary to refer the employee for further evaluation. In each case, all necessary evaluations must be completed within 20 days of the date on which the employee contacts the professional.

(d) *When treatment is required.* If the substance abuse professional determines that the employee is affected by psychological or chemical dependence on alcohol or a drug or by another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation, the following conditions and procedures apply:

(1) The railroad must, to the extent necessary for treatment and rehabilitation, grant the employee a leave of absence from the railroad for the period necessary to complete primary treatment and establish control over the employee's alcohol or drug problem. The policy must allow a leave of absence of not less than 45 days, if necessary for the purpose of meeting initial treatment needs.

(2) The employee must agree to undertake and successfully complete a course of treatment deemed acceptable by the substance abuse professional.

(3) The railroad must promptly return the employee to service, on recommendation of the substance abuse professional, when the employee has established control over the substance abuse problem. Return to service may also be conditioned on successful completion of a return-to-service medical examination. Approval to return to service may not be unreasonably withheld.

(4) Following return to service, the employee, as a further condition on withholding of discipline, may, as necessary, be required to participate in a reasonable program of follow-up treatment for a period not to exceed 60 months from the date the employee was originally withdrawn from service.

(e) *When treatment is not required.* If the substance abuse professional determines that the employee is not affected by an identifiable and treatable mental or physical disorder—

(1) The railroad must return the employee to service within 5 days after completion of the evaluation.

(2) During or following the out-of-service period, the railroad may require the employee to participate in a program of education and training concerning the effects of alcohol and drugs on occupational or transportation safety.

(f) *Follow-up tests.* A railroad may conduct return-to-service and/or follow-up tests (as described in § 219.104) of an employee who waives investigation and is determined to be ready to return to service under this section.

§ 219.407 Alternate policies.

(a) In lieu of a policy under § 219.403 (voluntary referral) or § 219.405 (co-worker report), or both, a railroad may adopt, publish and implement, with respect to a particular class or craft of covered employees, an alternate policy or policies having as their purpose the prevention of alcohol or drug use in railroad operations, if such policy or policies have the written concurrence of the recognized representatives of such employees.

(b) The concurrence of recognized employee representatives in an alternate policy may be evidenced by a collective bargaining agreement or any other document describing the class or craft of employees to which the alternate policy applies. The agreement or other document must make express reference to this part and to the intention of the railroad and employee representatives that the alternate policy applies in lieu of the policy required by § 219.403, § 219.405, or both.

(c) The railroad must file the agreement or other document described in paragraph (b) of this section with the Associate Administrator for Safety, FRA. If the alternate policy is amended or revoked, the railroad must file a notice of such amendment or revocation at least 30 days prior to the effective date of such action.

(d) This section does not excuse a railroad from adopting, publishing and implementing the policies required by §§ 219.403 and 219.405 with respect to any group of covered employees not within the coverage of an appropriate alternate policy.

Subpart F—Pre-Employment Tests

§ 219.501 Pre-employment drug testing.

(a) Prior to the first time a covered employee performs covered service for a railroad, the employee must undergo testing for drugs. No railroad may allow a covered employee to perform covered service, unless the employee has been administered a test for drugs with a

result that did not indicate the misuse of controlled substances. This requirement applies to final applicants for employment and to employees seeking to transfer for the first time from non-covered service to duties involving covered service.

(b) As used in subpart H of this part with respect to a test required under this subpart, the term covered employee includes an applicant for pre-employment testing only. In the case of an applicant who declines to be tested and withdraws the application for employment, no record may be maintained of the declination.

§ 219.502 Pre-employment alcohol testing.

(a) A railroad may, but is not required to, conduct pre-employment alcohol testing under this part. If a railroad chooses to conduct pre-employment alcohol testing, the railroad must comply with the following requirements:

(1) It must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions).

(2) It must treat all safety-sensitive employees performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (i.e., it must not test some covered employees and not others).

(3) It must conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test.

(4) It must conduct all pre-employment alcohol tests using the alcohol testing procedures of part 40 of this title.

(5) It must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates an alcohol concentration of less than 0.04.

(b) As used in subpart H of this part, with respect to a test authorized under this subpart, the term covered employee includes an applicant for pre-employment testing only. In the case of an applicant who declines to be tested and withdraws the application for employment, no record may be maintained of the declination.

§ 219.503 Notification; records.

The railroad must provide for medical review of drug test results as provided in subpart H of this part. The railroad must notify the applicant of the results of the drug and alcohol tests in the same manner as provided for employees in subpart H of this part. Records must be maintained confidentially and be retained in the same manner as required under subpart J of this part for employee test records, except that such records need not reflect the identity of an applicant whose application for employment in covered service was denied.

§ 219.505 Refusals.

An applicant who has refused to submit to pre-employment testing under this section may not be employed in covered service based upon the application and examination with respect to which such refusal was made. This section does not create any right on the part of the applicant to have a subsequent application considered; nor does it restrict the discretion of the railroad to entertain a subsequent application for employment from the same person.

Subpart G—Random Alcohol and Drug Testing Programs

§ 219.601 Railroad random drug testing programs.

(a) *Submission.* Each railroad must submit for FRA approval a random testing program meeting the requirements of this subpart. A railroad commencing operations must submit such a program not later than 30 days prior to such commencement. The program must be submitted to the Associate Administrator for Safety, FRA, for review and approval by the FRA Administrator. If, after approval, a railroad desires to amend the random testing program implemented under this subpart, the railroad must file with FRA a notice of such amendment at least 30 days prior to the intended effective date of such action. A railroad already subject to this subpart that becomes subject to this subpart with respect to one or more additional employees must amend its program not later than 60 days after these employees become subject to this subpart and file with FRA a notice of such amendment at least 30 days prior to the intended effective date of such action. A program responsive to the requirements of this section or any amendment to the program may not be implemented prior to approval.

(b) *Form of programs.* Random testing programs submitted by or on behalf of each railroad under this subpart must meet the following criteria, and the railroad and its managers, supervisors, officials and other employees and agents must conform to such criteria in implementing the program:

(1) Selection of covered employees for testing must be made by a method employing objective, neutral criteria which ensure that every covered employee has a substantially equal statistical chance of being selected within a specified time frame. The method may not permit subjective factors to play a role in selection, i.e., no employee may be selected as the result of the exercise of discretion by the railroad. The selection method must be capable of verification with respect to the randomness of the selection process, and any records necessary to document random selection must be retained for not less than 24 months from the date upon which the particular specimens were collected.

(2)(i) The program must select for testing a sufficient number of employees so that, during the first 12 months—

(A) The random testing program is spread reasonably through the 12-month period.

(B) [Reserved]

(ii) During the subsequent 12-month period, the program must select for testing a sufficient number of employees so that the number of tests conducted will equal at least 50 percent of the number of covered employees. Annualized percentage rates must be determined by reference to the total number of covered employees employed by the railroad at the beginning of the particular twelve-month period or by an alternate method specified in the plan approved by the Associate Administrator for Safety, FRA. If the railroad conducts random testing through a consortium, the annual rate may be calculated for each individual employer or for the total number of covered employees subject to random testing by the consortium.

(3) Railroad random testing programs must ensure to the maximum extent practicable that each employee perceives the possibility that a random test may be required on any day the employee reports for work.

(4) Notice of an employee's selection may not be provided until the duty tour in which testing is to be conducted, and then only so far in advance as is reasonably necessary to ensure the employee's presence at the time and place set for testing.

(5) The program must include testing procedures and safeguards, and procedures for action based on positive test results, consistent with this part.

(6) An employee must be subject to testing only while on duty. Only employees who perform covered service for the railroad are subject to testing under this part. In the case of employees who during some duty tours perform

covered service and during others do not, the railroad program must specify the extent to which, and the circumstances under which they are to be subject to testing. To the extent practical within the limitations of this part and in the context of the railroad's operations, the railroad program must provide that employees are subject to the possibility of random testing on any day they actually perform covered service.

(7) Each time an employee is notified for random drug testing the employee will be informed that selection was made on a random basis.

(c) *Approval.* The Associate Administrator for Safety, FRA, will notify the railroad in writing whether the program is approved as consistent with the criteria set forth in this part. If the Associate Administrator for Safety determines that the program does not conform to those criteria, the Associate Administrator for Safety will inform the railroad of any matters preventing approval of the program, with specific explanation as to necessary revisions. The railroad must resubmit its program with the required revisions within 30 days of such notice. Failure to resubmit the program with the necessary revisions will be considered a failure to implement a program under this subpart.

(d) *Implementation.* (1) No later than 45 days prior to commencement of random testing, the railroad must publish to each of its covered employees, individually, a written notice that he or she will be subject to random drug testing under this part. Such notice must state the date for commencement of the program, must state that the selection of employees for testing will be on a strictly random basis, must describe the consequences of a determination that the employee has violated § 219.102 or any applicable railroad rule, and must inform the employee of the employee's rights under subpart E of this part. A copy of the notice must be provided to each new covered employee on or before the employee's initial date of service. Since knowledge of Federal law is presumed, nothing in this paragraph (d)(1) creates a defense to a violation of § 219.102.

(2) A railroad commencing operations must submit a random testing program 60 days after doing so. The railroad must implement its approved random testing program not later than the expiration of 60 days from approval by the Administrator.

§ 219.602 FRA Administrator's determination of random drug testing rate.

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random drug testing must be 50 percent of covered employees.

(b) The FRA Administrator's decision to increase or decrease the minimum annual percentage rate for random drug testing is based on the reported positive rate for the entire industry. All information used for this determination is drawn from the drug MIS reports required by this part. In order to ensure reliability of the data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from railroads, and may make appropriate modifications in calculating the industry positive rate. Each year, the Administrator will publish in the **Federal Register** the minimum annual percentage rate for random drug testing of covered employees. The new minimum annual percentage rate for random drug testing will be applicable starting January 1 of the calendar year following publication.

(c) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 219.803 for two consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

(d) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of § 219.803 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered employees.

(e) Selection of covered employees for testing must be made by a method employing objective, neutral criteria which ensures that every covered employee has a substantially equal statistical chance of being selected within a specified time frame. The method may not permit subjective factors to play a role in selection, i.e., no employee may be selected as a result of the exercise of discretion by the railroad. The selection method must be capable of verification with respect to the randomness of the selection process.

(f) The railroad must randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random drug testing determined by the Administrator. If the railroad conducts random drug testing through a consortium, the number of employees to be tested may be calculated for each individual railroad or may be based on the total number of covered employees covered by the consortium who are subject to random drug testing at the same minimum annual percentage rate under this part or any DOT agency drug testing rule.

(g) Each railroad must ensure that random drug tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

(h) If a given covered employee is subject to random drug testing under the drug testing rules of more than one DOT agency for the same railroad, the employee must be subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function.

(i) If a railroad is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the railroad may—

(1) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or

(2) Randomly select such employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the railroad is subject.

§ 219.603 Participation in drug testing.

A railroad shall, under the conditions specified in this subpart and subpart H of this part, require a covered employee selected through the random testing program to cooperate in urine testing to determine compliance with § 219.102, and the employee must provide the required specimen and complete the required paperwork and certifications. Compliance by the employee may be excused only in the case of a documented medical or family emergency.

§ 219.605 Positive drug test results; procedures.

(a) [Reserved]

(b) Procedures for administrative handling by the railroad in the event a specimen provided under this subpart is reported as positive by the MRO are set forth in § 219.104. The responsive action required in § 219.104 is not stayed pending the result of a retest or split specimen test.

§ 219.607 Railroad random alcohol testing programs.

(a) Each railroad must submit for FRA approval a random alcohol testing program meeting the requirements of this subpart. A railroad commencing operations must submit a random alcohol testing program not later than 30 days prior to such commencement. The program must be submitted to the Associate Administrator for Safety, FRA, for review and approval. If, after approval, a railroad desires to amend the random alcohol testing program implemented under this subpart, the railroad must file with FRA a notice of such amendment at least 30 days prior to the intended effective date of such action. A program responsive to the requirements of this section or any amendment to the program may not be implemented prior to approval.

(b) *Form of programs.* Random alcohol testing programs submitted by or on behalf of each railroad under this subpart must meet the following criteria, and the railroad and its managers, supervisors, officials and other employees and agents must conform to such criteria in implementing the program:

(1) Selection of covered employees for testing must be made by a method employing objective, neutral criteria which ensures that every covered employee has a substantially equal statistical chance of being selected within a specified time frame. The method may not permit subjective factors to play a role in selection, i.e., no employee may be selected as the result of the exercise of discretion by the railroad. The selection method must be capable of verification with respect to the randomness of the selection process, and any records necessary to document random selection must be retained for not less than 24 months from the date upon which the particular specimens were collected.

(2) The program must include testing procedures and safeguards, and, consistent with this part, procedures for action based on tests where the employee is found to have violated § 219.101.

(3) The program must ensure that random alcohol tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

(4) The program must ensure to the maximum extent practicable that each covered employee perceives the possibility that a random alcohol test may be required at any time the employee reports for work and at any time during the duty tour (except any period when the employee is expressly relieved of any responsibility for performance of covered service).

(5) An employee may be subject to testing only while on duty. Only employees who perform covered service for the railroad may be subject to testing under this part. In the case of employees who during some duty tours perform covered service and during others do not, the railroad program may specify the extent to which, and the circumstances under which they are subject to testing. To the extent practical within the limitations of this part and in the context of the railroad's operations, the railroad program must provide that employees are subject to the possibility of random testing on any day they actually perform covered service.

(6) Testing must be conducted promptly, as provided in § 219.701(b)(1).

(7) Each time an employee is notified for random alcohol testing the employee must be informed that selection was made on a random basis.

(8) Each railroad must ensure that each covered employee who is notified of selection for random alcohol testing proceeds to the test site immediately; provided, however, that if the employee is performing a safety-sensitive function at the time of the notification, the railroad must instead ensure that the employee ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

(c) *Implementation.* (1) No later than 45 days prior to commencement of random alcohol testing, the railroad must publish to each of its covered employees, individually, a written notice that the employee will be subject to random alcohol testing under this part. Such notice must state the date for commencement of the program, must state that the selection of employees for testing will be on a strictly random basis, must describe the consequences of a determination that the employee has violated § 219.101 or any applicable railroad rule, and must inform the employee of the employee's rights under subpart E of this part. A copy of the notice must be provided to each new covered employee on or before the employee's initial date of service. Since knowledge of Federal law is presumed, nothing in this paragraph (c)(1) creates a defense to a violation of § 219.101. This notice may be combined with the notice or policy statement required by § 219.23.

(2) A railroad commencing operations must submit a random testing program 60 days after doing so. The railroad must implement its approved random testing program not later than the expiration of 60 days from approval by the Administrator.

§ 219.608 FRA Administrator's determination of random alcohol testing rate.

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random alcohol testing must be 25 percent of covered employees.

(b) The Administrator's decision to increase or decrease the minimum annual percentage rate for random alcohol testing is based on the violation rate for the entire industry. All information used for the determination is drawn from the alcohol MIS reports required by this part. In order to ensure reliability of the data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry violation rate. Each year, the Administrator will publish in the **Federal Register** the minimum annual percentage rate for random alcohol testing of covered employees. The new minimum annual percentage rate for random alcohol testing will be applicable starting January 1 of the calendar year following publication.

(c)(1) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the Administrator may lower this rate to 10 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 219.801 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 219.801 for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(d)(1) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of § 219.801 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent of all covered employees.

(2) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of § 219.801 for any calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent of all covered employees.

(e) The railroad must randomly select and test a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random alcohol testing determined by the Administrator. If the railroad conducts random alcohol testing through a consortium, the number of employees to be tested may be calculated for each individual employer or may be based on the total number of covered employees covered by the consortium who are subject to random testing at the same minimum annual percentage rate under this part or any DOT agency alcohol testing rule.

(f) If a railroad is required to conduct random alcohol testing under the alcohol testing rules of more than one DOT agency, the railroad may—

(1) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or

(2) Randomly select such employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the railroad is subject.

§ 219.609 Participation in alcohol testing.

A railroad must, under the conditions specified in this subpart and subpart H of this part, require a covered employee selected through the random testing program to cooperate in breath testing to determine compliance with § 219.101, and the employee must provide the required breath and complete the required paperwork and certifications. Compliance by the employee may be excused only in the case of a documented medical or family emergency.

§ 219.611 Test result indicating prohibited alcohol concentration; procedures.

Procedures for administrative handling by the railroad in the event an employee's confirmation test indicates an alcohol concentration of .04 or greater are set forth in § 219.104.

Subpart H—Drug and Alcohol Testing Procedures

§ 219.701 Standards for drug and alcohol testing.

(a) Drug testing required or authorized by subparts B, D, F, and G of this part must be conducted in compliance with all applicable provisions of the Department of Transportation Procedures for Transportation Workplace Drug and Alcohol Testing Programs (part 40 of this title).

(b) Alcohol testing required or authorized by subparts B, D, F, and G of this part must be conducted in compliance with all applicable provisions of the Department of Transportation Procedures for Transportation Workplace Drug and Alcohol Testing Programs (part 40 of this title).

(c) Each covered employee who is notified of selection for testing and who is not performing covered service at the time of notification must proceed to the testing site immediately. The railroad must ensure that an employee who is performing covered service at the time of notification shall, as soon as possible without affecting safety, cease to perform covered service and proceed to the testing site.

Subpart I—Annual Report

§ 219.801 Reporting alcohol misuse prevention program results in a management information system.

(a) Each railroad that has 400,000 or more total manhours shall submit to FRA by March 15 of each year a report covering the previous calendar year (January 1—December 31), summarizing the results of its alcohol misuse prevention program.

(b) A railroad that is subject to more than one DOT agency alcohol regulation must identify each employee covered by the regulations of more than one DOT agency. The identification will be by the total number and category of covered functions. Prior to conducting any alcohol test on a covered employee subject to the regulations of more than one DOT agency, the railroad must determine which DOT agency regulation or rule authorizes or requires the test. The test result information must be directed to the appropriate DOT agency or agencies.

(c) Each railroad must ensure the accuracy and timeliness of each report submitted. The report must be submitted on one of the two forms specified by the FRA.

(d) Each report required by this section that contains information on an alcohol screening test result of .02 or greater or a violation of the alcohol misuse provisions of subpart B of this part must include the following elements:

(1) Number of covered employees by employee category (i.e., train service, engine service, dispatcher/operator, signal, other).

(2) Number of covered employees in each category subject to alcohol testing under the alcohol misuse regulation of another DOT agency, identified by each agency.

(3)(i) Number of screening tests by type of test (i.e., pre-employment and covered service transfer, random, post-positive return to service, and follow-up) and employee category.

(ii) Number of confirmation tests, by type of test and employee category.

(4) Number of confirmation alcohol tests indicating an alcohol concentration equal of .02 or greater but less than .04, by type of test and employee category.

(5) Number of confirmation alcohol tests indicating an alcohol concentration of .04 or greater, by type of test and employee category.

(6) Number of persons denied a position as a covered employee following a pre-employment alcohol test indicating an alcohol concentration of .04 or greater.

(7) Number of covered employees with a confirmation alcohol test indicating an alcohol concentration of .04 or greater, or who have violations of other alcohol misuse provisions, who were returned to service in covered positions (having complied with the recommendations of a substance abuse professional as described in § 219.104(d)).

(8) For cause breath alcohol testing under railroad authority, by reason for test (accident/injury or rules violation), the number of screening tests conducted, the number of confirmation tests conducted, the number of confirmation tests of .02 or greater but less than .04, and the number of confirmation test results of .04 or greater.

(9) For cause breath alcohol testing under FRA authority, by reason for test (reasonable suspicion, accident/injury or rules violation), the number of screening tests conducted, the number of confirmation tests conducted, the number of confirmation tests of .02 or greater but less than .04, and the number of confirmation test results of .04 or greater.

(10) Number of covered employees who were found to have violated other provisions of subpart B of this part, and the action taken in response to the violation.

(11) Number of covered employees who were administered alcohol and drug tests at the same time, with both a positive drug test result and an alcohol test result indicating an alcohol concentration of .04 or greater.

(12) Number of covered employees who refused to submit to a random alcohol test required under this part.

(13) Number of covered employees who refused to submit to a non-random alcohol test required under this part.

(14) Number of supervisory personnel who have received the required initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use during the reporting period.

(e) Each report required by this section that contains information on neither a screening test result of 0.02 or greater nor a violation of the alcohol misuse provisions of subpart B of this part must include the following informational elements:

(1) Number of covered employees by employee category (i.e., train service, engine service, dispatcher/operator, signal, other).

(2) Number of covered employees in each category subject to alcohol testing under the alcohol misuse regulation of another DOT agency, identified by each agency.

(3) Number of screening tests by type of test (i.e., pre-employment and covered service transfer, random, post-positive return to service, and follow-up) and employee category.

(4) Number of covered employees with a confirmation alcohol test indicating an alcohol concentration of .04 or greater, or who have violations of other alcohol misuse provisions, who were returned to service in covered positions (having complied with the recommendations of a substance abuse professional as described in § 219.104(d)).

(5) For cause breath alcohol testing under railroad authority, by reason for test (accident/injury or rules violation), the number of screening tests conducted.

(6) For cause breath alcohol testing under FRA authority, by reason for test (reasonable suspicion, accident/injury or rules violation), the number of screening tests conducted.

(7) Number of covered employees who refused to submit to a random alcohol test required under this part.

(8) Number of covered employees who refused to submit to a non-random alcohol test required under this part.

(9) Number of supervisory personnel who have received the required initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use during the reporting period.

§ 219.803 Reporting drug misuse prevention program results in a management information system.

(a) Each railroad that has 400,000 or more total manhours shall submit to FRA an annual report covering the calendar year, summarizing the results of its drug misuse prevention program.

(b) A railroad that is subject to more than one DOT agency drug regulation must identify each employee covered by the regulations of more than one DOT agency. The identification will be by the total number and category of covered functions. Prior to conducting any drug test on a covered employee subject to the regulations of more than one DOT agency, the railroad must determine which DOT agency regulation or rules authorizes or requires the test. The test result information must be directed to the appropriate DOT agency or agencies.

(c) Each railroad must ensure the accuracy and timeliness of each report submitted by the railroad or a consortium.

(d) Each railroad must submit the required annual reports no later than March 15 of each year. The report must be submitted on one of the forms specified by the FRA. A railroad with no positive test result must submit the ''Drug Testing Management Information System Zero Positives Data Collection Form.'' All other railroads must submit the ''Drug Testing Management Information System Data Collection Form.''

(e) A railroad submitting the ''Drug Testing Management Information System Data Collection Form'' must address each of the following data elements:

(1) Number of covered employees by employee category (i.e., train service, engine service, dispatcher/operator, signal service, other).

(2) Number of covered employees in each category subject to testing under the anti-drug regulations of more than one DOT agency, identified by each agency.

(3) Number of specimens collected by type of test (i.e., pre-employment and covered service transfer, random, post-positive return to service, and follow-up), and employee category.

(4) Number of specimens verified negative by a Medical Review Officer (MRO) by type of test, and employee category.

(5) Number of specimens verified positive for one or more of the five drugs by a MRO by type of test, employee category, and type of drug. If a test has been verified positive by a MRO for multiple drugs, the employer should report the result as a positive for each type of drug.

(6) Number of applicants or transfers denied employment or transfer to a covered service position following a verified positive pre-employment drug test.

(7) Number of employees, currently in or having completed rehabilitation or otherwise qualified to return to duty, who have returned to work in a covered position during the reporting period.

(8) For cause drug testing, the number of specimens collected by reason for test (i.e., accident/injury, rules violation, or reasonable suspicion), type of authority (railroad or FRA), employee category and type of drug, including drugs tested for under railroad authority only.

(9) For cause drug testing, the number of specimens verified negative by a MRO by reason for test, type of authority, employee category and type of drug, including drugs tested for under railroad authority only.

(10) For cause drug testing, the number of specimens verified positive by a MRO by reason for test, type of authority, employee category and type of drug, including drugs tested for under railroad authority only.

(11) For cause breath alcohol testing under railroad authority, by reason for test, the number of tests conducted, the number of tests with a positive result (i.e., breath alcohol concentration (BAC) = or > .02), and the number of refusals.

(12) For cause urine alcohol testing under railroad authority, by reason for test, the number of tests conducted, the number of tests with a positive result, and the number of refusals.

(13) For cause breath alcohol testing under FRA authority, by reason for test, the number of tests conducted, the number of tests with a positive result, and the number of refusals.

(14) Total number of covered employees observed in documented operational tests and inspections related to enforcement of the railroad's rules on alcohol and drug use.

(15) Based on the tests and inspections described in paragraph (e)(14) of this section, the number of covered employees charged with a violation of the railroad's Rule G or similar rule or policy on drugs.

(16) Based on the tests and inspections described in paragraph (e)(14) of this section, the number of covered employees charged with a violation of the railroad's Rule G or similar rule or policy on alcohol.

(17) Number of specimens verified positive for more than one drug, by employee category and type of drug.

(18) Number of covered employees who refused to submit to a random drug test required under FRA authority.

(19) Number of covered employees who refused to submit to a non-random drug test required under FRA authority.

(20) Number of supervisory personnel who have received the required initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use during the reporting period.

(f) A railroad authorized to submit the ''Drug Testing Management Information System Zero Positives Data Collection Form'' must address each of the following data elements:

(1) Number of covered employees by employee category (i.e., train service, engine service, dispatcher/operator, signal service, other).

(2) Number of covered employees in each category subject to testing under the anti-drug regulations of more than one DOT agency, identified by each agency.

(3) Number of specimens collected and verified negative by type of test (i.e., pre-employment and covered service transfer, random, for cause due to accident/incident, for cause due to rules violation, reasonable suspicion, post-positive return to service, and follow-up), and employee category.

(4) For cause breath alcohol testing under railroad authority, the number of tests conducted by reason for test (i.e., accident/injury, rules violation, or reasonable suspicion).

(5) For cause urine alcohol testing under railroad authority, the number of tests conducted by reason for test.

(6) For cause breath alcohol testing under FRA authority, the number of tests conducted by reason for test.

(7) Total number of covered employees observed in documented operational tests and inspections related to enforcement of the railroad's rules on alcohol and drug use.

(8) Based on the tests and inspections described in paragraph (f)(7) of this section, the number of covered employees charged with a violation of the railroad's Rule G or similar rule or policy on drugs.

(9) Based on the tests and inspections described in paragraph (f)(7) of this section, the number of covered employees charged with a violation of the railroad's Rule G or similar rule or policy on alcohol.

(10) Number of covered employees who refused to submit to a random drug test required under FRA authority.

(11) Number of covered employees who refused to submit to a non-random drug test required under FRA authority.

(12) Number of supervisory personnel who have received the required initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use during the reporting period.

Subpart J—Recordkeeping Requirements

§ 219.901 Retention of alcohol testing records.

(a) *General requirement.* In addition to the records required to be kept by part 40 of this title, each railroad must maintain alcohol misuse prevention program records in a secure location with controlled access as set out in this section.

(b) Each railroad must maintain the following records for a minimum of five years:

(1) A summary record of each covered employee's test results; and

(2) A copy of the annual report summarizing the results of its alcohol misuse prevention program (if required to submit the report under § 219.801(a)).

(c) Each railroad must maintain the following records for a minimum of two years:

(1) Records related to the collection process:

(i) Collection logbooks, if used.

(ii) Documents relating to the random selection process.

(iii) Documents generated in connection with decisions to administer reasonable suspicion alcohol tests.

(iv) Documents generated in connection with decisions on post-accident testing.

(v) Documents verifying the existence of a medical explanation of the inability of a covered employee to provide an adequate specimen.

(2) Records related to test results:

(i) The railroad's copy of the alcohol test form, including the results of the test.

(ii) Documents related to the refusal of any covered employee to submit to an alcohol test required by this part.

(iii) Documents presented by a covered employee to dispute the result of an alcohol test administered under this part.

(3) Records related to other violations of this part.

(4) Records related to employee training:

(i) Materials on alcohol abuse awareness, including a copy of the railroad's policy on alcohol abuse.

(ii) Documentation of compliance with the requirements of § 219.23.

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion.

(iv) Certification that any training conducted under this part complies with the requirements for such training.

§ 219.903 Retention of drug testing records.

(a) *General requirement.* In addition to the records required to be kept by part 40 of this title, each railroad must maintain drug abuse prevention program records in a secure location with controlled access as set forth in this section.

(b) (1) Each railroad must maintain the following records for a minimum of five years:

(i) A summary record of each covered employee's test results; and

(ii) A copy of the annual report summarizing the results of its drug misuse prevention program (if required to submit under § 219.803(a)).

(2) Each railroad must maintain the following records for a minimum of two years.

(c) *Types of records.* The following specific records must be maintained:

(1) Records related to the collection process:

(i) Documents relating to the random selection process.

(ii) Documents generated in connection with decisions to administer reasonable suspicion drug tests.

(iii) Documents generated in connection with decisions on post-accident testing.

(iv) Documents verifying the existence of a medical explanation of the inability of a covered employee to provide a specimen.

(2) Records related to test results:

(i) The railroad's copy of the drug test custody and control form, including the results of the test.

(ii) Documents presented by a covered employee to dispute the result of a drug test administered under this part.

(3) Records related to other violations of this part.

(4) Records related to employee training:

(i) Materials on drug abuse awareness, including a copy of the railroad's policy on drug abuse.

(ii) Documentation of compliance with the requirements of § 219.23.

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion.

(iv) Certification that any training conducted under this part complies with the requirements for such training.

§ 219.905 Access to facilities and records.

(a) Release of covered employee information contained in records required to be maintained under §§ 219.901 and 219.903 must be in accordance with part 40 of this title and with this section. (For purposes of this section only, urine drug testing records are considered equivalent to breath alcohol testing records.)

(b) Each railroad must permit access to all facilities utilized in complying with the requirements of this part to the Secretary of Transportation, United States Department of Transportation, or any DOT agency with regulatory authority over the railroad or any of its covered employees.

(c) Each railroad must make available copies of all results for railroad alcohol and drug testing programs conducted under this part and any other information pertaining to the railroad's alcohol and drug misuse prevention program, when requested by the Secretary of Transportation or any DOT agency with regulatory authority over the railroad or covered employee.

Appendix A to Part 219—Schedule of Civil Penalties

The following chart lists the schedule of civil penalties:

PENALTY SCHEDULE [1]

Section [2]	Violation	Willful violation
Subpart A—General		
219.3 Application:		
Railroad does not have required program	$5,000	$7,500
219.11 General conditions for chemical tests:		
(b)(1) Employee unlawfully refuses to participate in testing	2,500	5,000
(b)(2) Employer fails to give priority to medical treatment	3,000	8,000
(b)(3) Employee fails to remain available	2,500	5,000
(b)(4) Employee tampers with specimen	2,500	5,000
(d) Employee unlawfully required to execute a waiver of rights	2,500	5,000
(e) Railroad used or authorized the use of coercion to obtain specimens	.....	7,500
(g) Failure to meet supervisory training requirements or program of instruction not available or program not complete	2,500	5,000
(h) Urine or blood specimens provided for Federal testing were used for non-authorized testing	2,500	5,000
219.23 Railroad policies:		
(a) Failure to provide written notice of FRA test	1,000	4,000
(b) Failure to provide written notice of basis for FRA test	1,000	4,000
(c) Use of Subpart C form for other test	1,000	4,000
(d) Failure to provide educational materials	1,000	4,000
(e) Educational materials fail to explain requirements of this part and/or include required content	1,000	4,000
(f) Non-Federal provisions are clearly described as independent authority	1,000	4,000
Subpart B—Prohibitions		
219.101 Alcohol and drug use prohibited:		
Employee violates prohibition(s)	10,000	.....
219.103 Prescribed and over-the-counter drugs:		
(a) Failure to train employee properly on requirements	2,500	5,000
219.104 Responsive action:		
(a) Failure to remove employee from covered service immediately	3,000	8,000
(b) Failure to provide notice for removal	1,000	4,000
(c) Failure to provide prompt hearing	2,000	7,000
(d) Employee improperly returned to service	2,000	7,000
219.105 Railroad's duty to prevent violations:		
(a) Employee improperly permitted to remain in covered service	7,000	10,000
(b) Failure to exercise due diligence to assure compliance with prohibition	2,500	5,000
219.107 Consequences of unlawful refusal:		
(a) Failure to disqualify an employee for nine months following a refusal	5,000	7,500
(e) Employee unlawfully returned to service	5,000	7,500
Subpart C—Post-Accident Toxicological Testing		
219.201 Events for which testing is required:		
(a) Failure to test after qualifying event (each employee not tested is a violation)	5,000	7,500
(c)(1)(i) Failure to make good faith determination	2,500	5,000
(c)(1)(ii) Failure to provide requested decision report to FRA	1,000	3,000
(c)(2) Testing performed after non-qualifying event	5,000	10,000
219.203 Responsibilities of railroads and employees:		
(a)(1)(i) and (a)(2)(i) Failure to properly test/exclude from testing	2,500	5,000
(a)(1)(ii) and (a)(2)(ii) Non-covered service employee tested	2,500	5,000
(b)(1) Delay in obtaining specimens due to failure to make every reasonable effort	2,500	5,000
(c) Independent medical facility not utilized	2,500	5,000
(d) Failure to report event or contact FRA when intervention required	1,000	3,000
219.205 Specimen collection and handling:		
(a) Failure to observe requirements with respect to specimen collection, marking and handling	2,500	5,000
(b) Failure to provide properly prepared forms with specimens	2,500	5,000
(d) Failure to promptly or properly forward specimens	2,500	5,000
219.207 Fatality:		
(a) Failure to test	5,000	7,500
(a)(1) Failure to ensure timely collection and shipment of required specimens	2,500	5,000
(b) Failure to request assistance when necessary	2,500	5,000
219.209 Reports of tests and refusals:		

PENALTY SCHEDULE [1]—Continued

Section [2]	Violation	Willful violation
(a)(1) Failure to provide telephonic report	1,000	2,000
(b) Failure to provide written report of refusal to test	1,000	2,000
(c) Failure to maintain report explaining why test not conducted within 4 hours	1,000	2,000
219.211 Analysis and follow-up:		
(c) Failure of MRO to report review of positive results to FRA	2,500	5,000
Subpart D—Testing for Cause		
219.300 Mandatory reasonable suspicion testing:		
(a)(1) Failure to test when reasonable suspicion criteria met	5,000	7,500
(a)(2) Tested when reasonable suspicion criteria not met	5,000	7,500
219.301 Testing for reasonable cause:		
(a) Event did not occur during daily tour	2,500	5,000
(b)(2) Tested when accident/incident criteria not met	5,000	7,500
(b)(3) Tested when operating rules violation criteria not met	5,000	7,500
219.302 Prompt specimen collection:		
(a) Specimen collection not conducted promptly	2,500	5,000
Subpart E—Identification of Troubled Employees		
219.401 Requirement for policies:		
(b) Failure to publish and/or implement required policy	2,500	5,000
219.407 Alternate policies:		
(c) Failure to file agreement or other document or provide timely notice or revocation	2,500	5,000
Subpart F—Pre-Employment Tests		
219.501 Pre-employment tests:		
(a) Failure to perform pre-employment drug test before first time employee performs covered service	2,500	5,000
Subpart G—Random Testing Programs		
219.601 Railroad random drug programs:		
(a)(1) Failure to file a random program	2,500	5,000
(a)(2) Failure to file amendment to program	2,500	5,000
(b) Failure to meet random testing criteria	2,500	5,000
(b)(1)(i) Failure to use a neutral selection process	2,500	5,000
(b)(2)(i)(B) Testing not spread throughout the year	2,500	5,000
(b)(3) Testing not distributed throughout the day	2,500	5,000
(b)(4) Advance notice provided to employee	2,500	5,000
(b)(6) Testing when employee not on duty	2,500	5,000
219.601A Failure to include covered service employee in pool	2,500	5,000
219.602 Administrator's determination of drug testing rate:		
(f) Total number of tests below minimum random drug testing rate	2,500	5,000
219.603 Participation in drug testing:		
Failure to document reason for not testing selected employee	2,500	5,000
219.607 Railroad random alcohol programs:		
(a)(1) Failure to file a random alcohol program	2,500	5,000
(a)(2) Failure to file amendment to program	2,500	5,000
(b) Failure to meet random testing criteria	2,500	5,000
(b)(1) Failure to use a neutral selection process	2,500	5,000
(b)(5) Testing when employee not on duty	2,500	5,000
(b)(8) Advance notice provided to employee	2,500	5,000
219.607A Failure to include covered service employee in pool	2,500	5,000
219.608 Administrator's determination of random alcohol testing rate:		
(e) Total number of tests below minimum random alcohol testing rate	2,500	5,000
219.609 Participation in alcohol testing:		
Failure to document reason for not testing selected employee	2,500	5,000
Subpart H—Drug and Alcohol Testing Procedures		
219.701 Standards for drug and alcohol testing:		
(a) Failure to comply with Part 40 procedures in Subpart B, D, F, or G testing	−5,000	−7,500
(b) Testing not performed in a timely manner	2,500	5,000
Subpart I—Annual Report		
219.801 Reporting alcohol misuse prevention program results in a management information system:		
(a) Failure to submit MIS report on time	2,500	5,000
(c) Failure to submit accurate MIS report	2,500	5,000
(d) Failure to include required data	2,500	5,000
219.803 Reporting drug misuse prevention program results in a management information system:		
(c) Failure to submit accurate MIS report	2,500	5,000
(d) Failure to submit MIS report on report	2,500	5,000
(e) Failure to include required data	2,500	5,000
Subpart J—Recordkeeping Requirements		
219.901 Retention of Alcohol Testing Records:		
(a) Failure to maintain records required to be kept by Part 40	2,500	5,000
(b) Failure to maintain records required to be kept for five years	2,500	5,000
(c) Failure to maintain records required to be kept for two years	2,500	5,000
219.903 Retention of Drug Testing Records:		

PENALTY SCHEDULE [1]—Continued

Section [2]	Violation	Willful violation
(a) Failure to maintain records required to be kept by Part 40	2,500	5,000
(b) Failure to maintain records required to be kept for five years	2,500	5,000
(c) Failure to maintain records required to be kept for two years	2,500	5,000
219.905 Access to facilities and records:		
(a) Failure to release records in this subpart in accordance with Part 40	2,500	5,000
(b) Failure to permit access to facilities	2,500	5,000
(c) Failure to provide access to results of railroad alcohol and drug testing programs	2,500	5,000

[1] A penalty may be assessed against an individual only for a willful violation. The FRA Administrator reserves the right to assess a penalty of up to $22,000 for any violation, including ones not listed in this penalty schedule, where circumstances warrant. See 49 CFR Part 209, appendix A.

[2] The penalty schedule uses section numbers from 49 CFR Part 219; and if more than one item is listed as a type of violation of a given section, each item is also designated by a ''penalty code'' (e.g., ''A''), which is used to facilitate assessment of civil penalties. For convenience, penalty citations will cite the CFR section and the penalty code, if any (e.g., ''Sec. 219.11A'') FRA reserves the right, should litigation become necessary, to substitute in its complaint the CFR citation in place of the combined CFR and penalty code citation.

Appendix B to Part 219—Designation of Laboratory for Post-Accident Toxicological Testing

The following laboratory is currently designated to conduct post-accident toxicological analysis under Subpart C of this part: NWT Inc., 1141 E. 3900 South, Suite A–110, Salt Lake City, UT 84124, Telephone: (801) 268–2431 (Day), (801) 483–3383 (Night/Weekend).

Appendix C to Part 219—Post-Accident Testing Specimen Collection

1.0 *General.*

This appendix prescribes procedures for collection of specimens for mandatory post-accident testing pursuant to Subpart C of this part. Collection of blood and urine specimens is required to be conducted at an independent medical facility.

(*Surviving Employees*)

2.0 *Surviving Employees.*

This unit provides detailed procedures for collecting post-accident toxicological specimens from surviving employees involved in train accidents and train incidents, as required by Subpart C of this part. Subpart C specifies qualifying events and employees required to be tested.

2.1 *Collection Procedures; General.*

a. All forms and supplies necessary for collection and transfer of blood and urine specimens for three surviving employees can be found in the FRA post-accident shipping box, which is made available to the collection site by the railroad representative.

b. Each shipping box contains supplies for blood/urine collections from three individuals, including instructions and necessary forms. The railroad is responsible for ensuring that materials are fresh, complete and meet FRA requirements.

2.1.1 *Responsibility of the Railroad Representative.*

a. In the event of an accident/incident for which testing is required under Subpart C of this part, the railroad representative shall follow the designated set of instructions, and, upon arrival at the independent medical facility, promptly present to the collection facility representative a post-accident shipping box or boxes with all remaining sets of instructions. (Each box contains supplies to collect specimens from three employees.) The railroad representative shall request the collection facility representative to review the instructions provided and, through qualified personnel, provide for collection of the specimens according to the procedures set out.

b. The railroad representative shall undertake the following additional responsibilities—

1. Complete Form FRA 6180.73 (revised), Accident Information Required for Post-Accident Toxicological Testing (49 CFR Part 219), describing the testing event and identifying the employees whose specimens are to be deposited in the shipping box.

2. As necessary to verify the identity of individual employees, affirm the identity of each employee to the medical facility personnel.

3. Consistent with the policy of the collection facility, monitor the progress of the collection procedure.

Warning: Monitor but do not directly observe urination or otherwise disturb the privacy of urine or blood collection. Do not handle specimen containers, bottles or tubes (empty or full). Do not become part of the collection process.

2.1.2 *Employee Responsibility.*

a. An employee who is identified for post-accident toxicological testing shall cooperate in testing as required by the railroad and personnel of the independent medical facility. Such cooperation will normally consist of the following, to be performed as requested:

1. Provide a blood specimen, which a qualified medical professional or technician will draw using a single-use sterile syringe. The employee should be seated for this procedure.

2. Provide, in the privacy of an enclosure, a urine specimen into a plastic collection cup. Deliver the cup to the collector.

3. Do not let the blood and urine specimens that you provided leave your sight until they have been properly sealed and initialed by you.

4. Certify the statement in Step 4 of the Post-Accident Testing Blood/Urine Custody and Control Form (49 CFR 219) (Form FRA F 6180.74 (revised)).

5. If required by the medical facility, complete a separate consent form for taking of the specimens and their release to FRA for analysis under the FRA rule.

Note: The employee may not be required to complete any form that contains any waiver of rights the employee may have in the employment relationship or that releases or holds harmless the medical facility with respect to negligence in the collection.

2.2 *The Collection.*

Exhibit C–1 contains instructions for collection of specimens for post-accident toxicology from surviving employees. These instructions shall be observed for each collection. Instructions are also contained in each post-accident shipping box and shall be provided to collection facility personnel involved in the collection and/or packaging of specimens for shipment.

(Post Mortem Collection)

3.0 *Fatality.*

This unit provides procedures for collecting post-accident body fluid/tissue specimens from the remains of employees killed in train accidents and train incidents, as required by Subpart C of this part. Subpart C specifies qualifying events and employees required to be tested.

3.1 *Collection.*

In the event of a fatality for which testing is required under Subpart C of this part, the railroad shall promptly make available to the custodian of the remains a post-accident shipping box. The railroad representative shall request the custodian to review the instructions contained in the shipping box and, through qualified medical personnel, to provide the specimens as indicated.

(Surviving Employees and Fatalities)

4.0 *Shipment.*

a. The railroad is responsible for arranging overnight transportation of the sealed shipping box containing the specimens. When possible without incurring delay, the box should be delivered directly from the collection personnel providing the specimens to an overnight express service courier. If it becomes necessary for the railroad to transport the box from point of collection to point of shipment, then—

1. Individual kits and the shipping box shall be sealed by collection personnel before the box is turned over to the railroad representative;

2. The railroad shall limit the number of persons handling the shipping box to the minimum necessary to provide for transportation;

3. If the shipping box cannot immediately be delivered to the express carrier for transportation, it shall be maintained in secure temporary storage; and

4. The railroad representatives handling the box shall document chain of custody of the shipping box and shall make available such documentation to FRA on request.

Exhibit C–1—Instructions for Collection of Blood and Urine Specimens: Mandatory Post-Accident Toxicological Testing

A. Purpose

These instructions are for the use of personnel of collection facilities conducting collection of blood and urine specimens from surviving railroad employees following railroad accidents and casualties that qualify for mandatory alcohol/drug testing. The Federal Railroad Administration appreciates the participation of medical facilities in this important public safety program.

B. Prepare for Collection

a. Railroad employees have consented to provision of specimens for analysis by the Federal Railroad Administration as a condition of employment (49 CFR 219.11). A private, controlled area should be designated for collection of specimens and completion of paperwork.

b. Only one specimen should be collected at a time, with each employee's blood draw or urine collection having the complete attention of the collector until the specific specimen has been labeled, sealed and documented.

c. Please remember two critical rules for the collections:

d. All labeling and sealing must be done in the sight of the donor, with the specimen never having left the donor's presence until the specimen has been labeled, sealed and initialed by the donor.

e. Continuous custody and control of blood and urine specimens must be maintained and documented on the forms provided. In order to do this, it is important for the paperwork and the specimens to stay together.

f. To the extent practical, blood collection should take priority over urine collection. To limit steps in the chain of custody, it is best if a single collector handles both collections from a given employee.

g. You will use a single Post-Accident Testing Blood/Urine Custody and Control Form (FRA Form 6108.74 (revised)), consisting of six Steps to complete the collection for each employee. We will refer to it as the Control Form.

C. Identify the Donor

a. The employee donor must provide photo identification to each collector, or lacking this, be identified by the railroad representative.

b. The donor should remove all unnecessary outer garments such as coats or jackets, but may retain valuables, including a wallet. Donors should not be asked to disrobe, unless necessary for a separate physical examination required by the attending physician.

D. Draw Blood

a. Assemble the materials for collecting blood from each employee: two 10 ml grey-stoppered blood tubes and the Control Form.

b. Ask the donor to complete STEP 1 on the Control Form.

c. With the donor seated, draw two (2) 10 ml tubes of blood using standard medical procedures (sterile, single-use syringe into evacuated gray-top tubes provided).

CAUTION: Do not use alcohol or an alcohol-based swab to cleanse the venipuncture site.

d. Once both tubes are filled and the site of venipuncture is protected, immediately—

1. Seal and label each tube by placing a numbered blood specimen label from the label set on the Control Form over the top of the tube and securing it down the sides.

2. Ask the donor to initial each label. Please check to see that the initials match the employee's name and note any discrepancies in the ''Remarks'' block of the Control Form.

3. As collector, sign and date each blood tube label at the place provided.

4. Skip to STEP 5 and initiate chain of custody for the blood tubes by filling out the first line of the block to show receipt of the blood specimens from the donor.

5. Complete STEP 2 on the form.

6. Return the blood tubes into the individual kit. Keep the paperwork and specimens together. If another collector will be collecting the urine specimen from this employee, transfer both the form and the individual kit with blood tubes to that person, showing the transfer of the blood tubes on the second line of STEP 5 (the chain of custody block).

E. Collect Urine

a. The urine collector should assemble at his/her station the materials for collecting urine from each employee: one plastic collection cup with temperature device affixed enclosed in a heat-seal bag (with protective seal intact), two 90 ml urine specimen bottles with caps and one biohazard bag (with absorbent) also enclosed in a heat-seal bag (with protective seal intact), and the Control Form. Blood specimens already collected must remain in the collector's custody and control during this procedure.

b. After requiring the employee to wash his/her hands, the collector should escort the employee directly to the urine collection area. To the extent practical, all sources of water in the collection area should be secured and a bluing agent (provided in the box) placed in any toilet bowl, tank, or other standing water.

c. The employee will be provided a private place in which to void. Urination will not be directly observed. If the enclosure contains a source of running water that cannot be secured or any material (soap, etc.) that could be used to adulterate the specimen, the collector should monitor the provision of the specimen from outside the enclosure. Any unusual behavior or appearance should be noted in the remarks section of the Control Form or on the back of that form.

d. The collector should then proceed as follows:

e. Unwrap the collection cup in the employee's presence and hand it to the employee (or allow the employee to unwrap it).

f. Ask the employee to void at least 60 ml into the collection cup (at least to the line marked).

g. Leave the private enclosure.

IF THERE IS A PROBLEM WITH URINATION OR Specimen QUANTITY, SEE THE ''TROUBLE BOX'' AT THE BACK OF THESE INSTRUCTIONS.

h. Once the void is complete, the employee should exit the private enclosure and deliver the specimen to the collector. Both the collector and the employee must proceed immediately to the labeling/sealing area, with the specimen never leaving the sight of the employee before being sealed and labeled.

i. Upon receipt of the specimen, proceed as follows:

1. In the full view of the employee, remove the wrapper from the two urine specimen bottles. Transfer the urine from the collection cup into the specimen bottles (at least 30 ml in bottle A and at least 15 ml in bottle B).

2. As you pour the specimen into the specimen bottles, please inspect for any unusual signs indicating possible adulteration or dilution. Carefully secure the tops. Note any unusual signs under ''Remarks'' at STEP 3 of the Control Form.

3. Within 4 minutes after the void, measure the temperature of the urine by reading the strip on the bottle. Mark the result at STEP 3 of the Control Form.

IF THERE IS A PROBLEM WITH THE URINE Specimen, SEE THE ''TROUBLE BOX'' AT THE BACK OF THESE INSTRUCTIONS.

4. Remove the urine bottle labels from the Control Form. The labels are marked ''A'' and ''B.'' Place each label as marked over the top of its corresponding bottle, and secure the label to the sides of the bottle.

5. Ask the donor to initial each label. Please check to see that the initials match the employee name and note any discrepancy in the ''Remarks'' block of STEP 3.

6. As collector, sign and date each urine label.

7. Skip to STEP 5 and initiate chain-of-custody by showing receipt of the urine specimens from the donor. (If you collected the blood, a check under ''urine'' will suffice. If someone else collected the blood, first make sure transfer of the blood to you is documented. Then, using the next available line, show ''Provide specimens'' under purpose, ''Donor'' under ''released by,'' check under ''urine'' and place your name, signature and date in the space provided.)

8. Complete the remainder of STEP 3 on the Control Form.

9. Have the employee complete STEP 4 on the Control Form.

10. Place the filled urine bottles in the individual employee kit. Keep the paperwork and specimens together. If another collector will be collecting the blood specimen from this employee, transfer both the form and the kit to that person, showing the transfer of the urine specimens on the next available line of STEP 5 (the chain of custody block).

F. Seal the Individual Employee Kit

a. The blood and urine specimens have now been collected for this employee. The

blood/urine specimens will now be sealed into the individual employee kit, while all paperwork will be retained for further completion. After rechecking to see that each specimen is properly labeled and initialed, close the plastic bag to contain any leakage in transportation, and apply the kit security seal to the small individual kit. As collector, sign and date the kit seal.

b. Before collecting specimens from the next employee, complete the next line on the chain-of-custody block showing release of the blood and urine by yourself for the purpose of ''Shipment'' and receipt by the courier service or railroad representative that will provide transportation of the box, together with the date.

G. Complete Treatment Information

Complete STEP 6 of the Control Form. Mark the box if a breath alcohol test was conducted under FRA authority.

H. Prepare the Box for Shipment

a. Sealed individual employee kits should be retained in secure storage if there will be a delay in preparation of the shipping box. The shipping box shall be prepared and sealed by a collection facility representative as follows:

1. Inspect STEP 5 of each Control Form to ensure chain-of-custody is continuous and complete for each fluid (showing specimens released for shipment). Retain the medical facility copy of each Control Form and the Accident Information form for your records.

2. Place sealed individual employee kits in the shipping box. Place all forms in zip-lock bag and seal securely. Place bag with forms and unused supplies in shipping box.

3. Affix the mailing label provided to the outside of the shipping box.

I. Ship the Box

a. The railroad must arrange to have the box shipped overnight air express or (if express service is unavailable) by air freight, prepaid, to FRA's designated laboratory. Whenever possible without incurring delay, the collector should deliver the box directly into the hands of the express courier or air freight representative.

b. Where courier pickup is not immediately available at the collection facility where the specimens are taken, the railroad is required to transport the shipping box for expeditious shipment by air express, air freight or equivalent means.

c. *If the railroad is given custody of the box to arrange shipment,* please record the name of the railroad official taking custody on the copy of Form 6180.73 retained by the collection site.

''TROUBLE BOX''

1. Problem: *The employee claims an inability to urinate, either because he/she has recently voided or because of anxiety concerning the collection.*

Action: The employee may be offered moderate quantities of liquid to assist urination. If the employee continues to claim inability after 4 hours, the urine collection should be discontinued, but the blood specimens should be forwarded and all other procedures followed. Please note in area provided for remarks what explanation was provided by the employee.

2. Problem: *The employee cannot provide approximately 60 ml. of specimen.*

Action: The employee should remain at the collection facility until as much as possible of the required amount can be given (up to 4 hours). The employee should be offered moderate quantities of liquids to aid urination. The first bottle, if it contains any quantity of urine, should be sealed and securely stored with the blood tubes and Control Form pending shipment. A second bottle should then be used for the subsequent void (using a second Control Form with the words ''SECOND VOID—FIRST Specimen INSUFFICIENT'' in the remarks block and labels from that form). However, if after 4 hours the donor's second void is also insufficient or contains no more than the first insufficient void, discard the second void and send the first void to the laboratory.

3. Problem: *The urine temperature is outside the normal range* of 32 deg. – 38 deg.C/90 deg. – 100 deg.F, and a suitable medical explanation cannot be provided by an oral temperature or other means; or

4. Problem: *The collector observes conduct clearly and unequivocally indicating an attempt to substitute or adulterate the specimen* (e.g., substitute urine in plain view, blue dye in specimen presented, etc.) and a collection site supervisor or the railroad representative agrees that the circumstances indicate an attempt to tamper with the specimen.

Action (for either Problem No. 3 or Problem No. 4): Document the problem on the Control Form.

i. If the collection site supervisor or railroad representative concurs that the temperature of the specimen, or other clear and unequivocal evidence, indicates a possible attempt to substitute or alter the specimen, another void must be taken under direct observation by a collector of the same gender.

ii. If a collector of the same sex is not available, do NOT proceed with this step.

iii. If a collector of the same gender is available, proceed as follows: A new Control Form must be initiated for the second void. The original suspect specimen should be marked ''Void'' and the follow-up void should be marked ''Void 2,'' with both voids being sent to the laboratory and the incident clearly detailed on the Control Form.

Exhibit C–2—Instructions for Collection of Post Mortem Specimens: Employee Killed in a Railroad Accident/Incident

To the Medical Examiner, Coroner, or Pathologist:

a. In compliance with Federal safety regulations (49 CFR Part 219), a railroad representative has requested that you obtain specimens for toxicology from the remains of a railroad employee who was killed in a railroad accident or incident. The deceased consented to the taking of such specimens, as a matter of Federal law, by performing service on the railroad (49 CFR 219.11(f)).

b. Your assistance is requested in carrying out this program of testing, which is important to the protection of the public safety and the safety of those who work on the railroads.

A. Materials:

The railroad will provide you a post-accident shipping box that contains necessary supplies. If the box is not immediately available, please proceed using supplies available to you that are suitable for forensic toxicology.

B. Specimens requested, in order of preference:

a. Blood—20 milliliters or more. Preferred sites: intact femoral vein or artery or peripheral vessels (up to 10 ml, as available) and intact heart (20 ml). Deposit blood in gray-stopper tubes individually by site and shake to mix specimen and preservative.

Note: If uncontaminated blood is not available, bloody fluid or clots from body cavity may be useful for qualitative purposes; but do not label as blood. Please indicate source and identity of specimen on label of tube.

b. Urine—as much as 100 milliliters, if available. Deposit into plastic bottles provided.

c. Vitreous fluid—all available, deposited into smallest available tube (e.g., 3 ml) with 1% sodium fluoride, or gray-stopper tube (provided). Shake to mix specimen and preservative.

d. If available at autopsy, organs—50 to 100 grams each of two or more of the following in order preference, as available: liver, bile, brain, kidney, spleen, and/or lung. Specimens should be individually deposited into zip-lock bags or other clean, single use containers suitable for forensic specimens.

e. If vitreous or urine is not available, please provide—

1. Spinal fluid—all available, in 8 ml container (if available) with sodium fluoride or in gray-stopper tube; or, if spinal fluid cannot be obtained,

2. Gastric content—up to 100 milliliters, as available, into plastic bottle.

C. Specimen collection:

a. Sampling at time of autopsy is preferred so that percutaneous needle puncturing is not necessary. However, if autopsy will not be conducted or is delayed, please proceed with sampling.

b. Blood specimens should be taken by sterile syringe and deposited directly into evacuated tube, if possible, to avoid contamination of specimen or dissipation of volatiles (ethyl alcohol).

Note: If only cavity fluid is available, please open cavity to collect specimen. Note condition of cavity.

c. Please use smallest tubes available to accommodate available quantity of fluid specimen (with 1% sodium fluoride).

D. Specimen identification, sealing:

a. As each specimen is collected, seal each blood tube and each urine bottle using the respective blood tube or urine bottle using the identifier labels from the set provided with the Post-Accident Testing Blood/Urine Custody and Control Form (49 CFR part 219) (Form FRA F 6180.74 (revised)). Make sure the unique identification number on the labels match the pre-printed number on the Control Form. Please label other specimens

with name and specimen set identification numbers. You may use labels and seals from any of the extra forms, but annotate them accordingly.

b. Annotate each label with specimen description and source (as appropriate) (e.g., blood, femoral vein).

c. Please provide copy of any written documentation regarding condition of body and/or sampling procedure that is available at the time specimens are shipped.

E. Handling:

a. If specimens cannot be shipped immediately as provided below, specimens other than blood may be immediately frozen. Blood specimens should be refrigerated, but not frozen.

b. All specimens and documentation should be secured from unauthorized access pending delivery for transportation.

F. Information:

a. If the railroad has not already done so, please place the name of the subject at the top of the Control Form (STEP 1). You are requested to complete STEP 2 of the form, annotating it by writing the word ''FATALITY,'' listing the specimens provided, providing any further information under ''Remarks'' or at the bottom of the form. If it is necessary to transfer custody of the specimens from the person taking the specimens prior to preparing the box for shipment, please use the blocks provided in STEP 5 to document transfer of custody.

b. The railroad representative will also provide Accident Information Required for Post-Accident Toxicological Testing (49 CFR Part 219), Form FRA 6180.73 (revised). Both forms should be placed in the shipping box when completed; but you may retain the designated medical facility copy of each form for your records.

G. Packing the shipping box:

a. Place urine bottles and blood tubes in the sponge liner in the individual kit, close the biohazard bag zipper, close the kit and apply the kit custody seal to the kit. You may use additional kits for each tissue specimen, being careful to identify specimen by tissue, name of deceased, and specimen set identification number. Apply kit security seals to individual kits and initial across all seals. Place all forms in the zip-lock bag and seal securely.

b. Place the bag in the shipping box. Do not put forms in with the specimens. Seal the shipping box with the seal provided and initial and date across the seal.

c. Affix the mailing label to the outside of the box.

H. Shipping the box:

a. The railroad must arrange to have the box shipped overnight air express or (if express service is unavailable) by air freight, prepaid, to FRA's designated laboratory. When possible, but without incurring delay, deliver the sealed shipping box directly to the express courier or the air freight representative.

b. If courier pickup is not immediately available at your facility, the railroad is required to transport the sealed shipping box to the nearest point of shipment via air express, air freight or equivalent means.

c. *If the railroad receives the sealed shipping box to arrange shipment,* please record under ''Supplemental Information'' on the Control Form, the name of the railroad official taking custody.

I. Other:

FRA requests that the person taking the specimens annotate the Control Form under ''Supplemental Information'' if additional toxicological analysis will be undertaken with respect to the fatality. FRA reports are available to the coroner or medical examiner on request.

Issued in Washington, D.C., on July 26, 2001.

Betty Monro,

Deputy Federal Railroad Administrator.

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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Parts 653, 654, and 655

[Docket No. FTA–2000–8513]

RIN 2132–AA71

Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations

AGENCY: Federal Transit Administration, Department of Transportation

ACTION: Final rule.

SUMMARY: The Federal Transit Administration (FTA) has combined its drug and alcohol testing regulations. This final rule incorporates guidance that FTA has issued in the past several years in letters of interpretation, audit findings, newsletters, training classes, safety seminars, and public speaking engagements. In addition, this final rule conforms FTA's rule to the Department of Transportation's (DOT) revised drug and alcohol testing rule published on December 19, 2000.

DATES: The effective date of this final rule is August 1, 2001.

FOR FURTHER INFORMATION CONTACT: For program issues, Mark Snider, Office of Safety and Security, FTA, (202) 366–2896 (telephone); (202) 366–7951 (fax); or mark.snider@fta.dot.gov (e-mail). For legal issues, Bruce Walker, Office of the Chief Counsel, FTA, (202) 366–4011 (telephone); (202) 366–3809 (fax); or Bruce.Walker@fta.dot.gov (e-mail).

SUPPLEMENTARY INFORMATION:

Electronic Access

Electronic access to this rule and other safety rules may be obtained through the FTA Office of Safety and Security home page at *http://transit-safety.volpe.dot.gov.*

An electronic copy of this document may be downloaded, using a modem and suitable communications software, from the Government Printing Office's (GPO) Electronic Bulletin Board Service at (202) 512–1661. Internet users may download this document from the Office of the Federal Register's homepage at *http://www.nara.gov/fedreg* and from the GPO database at *http://www.access.gpo.gov/nara.*

Internet users can access all comments received by the U.S. DOT Dockets, Room PL–401, via the Dockets Management System (DMS) on the DOT home page at *http://dms.dot.gov.* The DMS is available 24 hours each day, 365 days each year. Please follow the online instructions for more information and help.

Regulatory Information

On April 30, 2001, FTA published a notice of proposed rulemaking (NPRM) proposing changes to conform its drug and alcohol testing regulation (49 CFR Part 655) to the December 19, 2000 revision of DOT's transportation workplace testing procedures at 49 CFR Part 40. (66 FR 21551). While several of the amendments to Part 40 became effective on January 18, 2001, the entire revised Part 40 will become effective on August 1, 2001.

Generally, final rules must be published at least 30 days before their effective dates. However, the Administrative Procedure Act (5 U.S.C. sec. 553(d)(3)) creates an exception to this general rule on the basis of good cause found by the agency. FTA is making this conforming rule effective immediately, rather than 30 days from the date of publication in the **Federal Register** to ensure that FTA's drug and alcohol testing regulation is consistent with the Department's Part 40 testing procedures, which are effective on August 1, 2001. This consistency is necessary in order to avoid overlap, conflict, duplication, or confusion among DOT drug and alcohol testing regulations. Unless this rule goes into effect immediately, there would be a 30-day period in which Part 40 would be in effect without FTA's conforming amended final rule. Since the new Part 40 was published over seven months ago, affected parties have had ample time to prepare to implement the changes in Part 40 to which this rule conforms.

I. Background

The Omnibus Transportation Employee Testing Act of 1991 (the Act)

mandated the Secretary of Transportation to issue regulations to combat prohibited drug use and alcohol misuse in the transportation industry. (Pub. L. 102–143, October 28, 1991, FTA sections codified at 49 U.S.C. 5331). In December 1992, FTA issued two NPRMs to prevent prohibited drug use and alcohol misuse by ''safety-sensitive'' employees in the transit industry. In February 1994, FTA adopted drug and alcohol testing rules, which were promulgated at 49 CFR Parts 653 and 654.

Omnibus Transportation Employee Testing Act of 1991

The Act requires FTA to issue regulations requiring recipients of Federal transit funds under 49 U.S.C. 5307, 5309, and 5311, and 23 U.S.C. 103(e)(4) to test safety-sensitive employees for the use of alcohol or drugs in violation of law or federal regulation. With respect to railroad operations, the Act allows FTA to defer to regulations issued by the Federal Railroad Administration (FRA).

As a condition of FTA funding, the Act requires recipients to establish alcohol and drug testing programs. The Act mandates four types of testing: pre-employment, random, reasonable suspicion, and post-accident. In addition, the Act permits return-to-duty and follow-up testing under specific circumstances. The Act requires that recipients follow the testing procedures set out by the Department of Health and Human Services (DHHS).

The Act does not require recipients to follow a particular course of action when they learn that a safety-sensitive employee has violated a law or Federal regulation concerning alcohol or drug use. Rather, the Act directs FTA to issue regulations establishing consequences for the use of alcohol or prohibited drugs by individuals performing safety-sensitive functions in the transit industry. Possible consequences include education, counseling, rehabilitation programs, and suspension or termination from employment.

In authorizing this regulatory scheme, the Act has pre-empted inconsistent State or local laws, rules, regulations, ordinances, standards, or orders. However, provisions of State criminal law, which impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, are not pre-empted by the Act.

Previous Action by FTA

On December 15, 1992, FTA issued two notices of proposed rule making to prevent prohibited drug use and alcohol misuse (49 CFR Parts 653 and 654). (57 FR 59646 and 57 FR 59660). The rules established a process whereby safety-sensitive employees would be tested on a pre-employment, random, reasonable suspicion, post-accident, return-to-duty, and follow-up basis.

In the December 1992 **Federal Register** notice, FTA stated that it was ''considering combining the final FTA alcohol and drug testing regulations into one part in the Code of Federal Regulations.'' At that time, FTA noted that while the drug and alcohol testing rules shared many similarities, there were still enough differences to warrant two distinct CFR Parts. On February 15, 1994, FTA adopted two separate rules: The drug testing rule, 49 CFR Part 653, and the alcohol testing rule, 49 CFR Part 654. (59 FR 7549 and 59 FR 7572).

Since the rules were first published, there have been two notable amendments as well as several minor (technical) amendments. In December 1998, FTA amended its post-accident regulation to allow an employer to seek post-accident test results from law enforcement agencies where the employer has been unable to timely perform such a test. (63 FR 67612). FTA has stressed the limited applicability of this amendment.

In January 1999, FTA amended its definition of ''[m]aintaining a revenue service vehicle or equipment,'' located under safety-sensitive function (§ 653.7 and § 654.7). (64 FR 425). The amended definition included covered employees of both recipients and contractors performing overhaul and rebuilding services of engines, parts, and vehicles. Previously, employees of contractors who were performing safety-sensitive functions did not have to comply with FTA drug and alcohol testing.

In issuing the amended definition, FTA noted that it would be unduly burdensome to subject the covered employees of contractors to the drug and alcohol regulations if the overhaul/rebuilding work was done on an ad hoc or one-time basis where no long-term contract between the grantee and its contractor existed. (64 FR 426). FTA will continue to exclude the covered employees of contactors who perform safety-sensitive functions on an ad hoc or one-time basis.

When the drug and alcohol rules initially became effective, FTA began an aggressive outreach effort to assist affected entities in complying with the new rules. FTA offered numerous courses throughout the country on implementation. Additionally, in April 1994, FTA published Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit and made them available to anyone seeking help implementing the rules. The guidelines were published in the **Federal Register** several months prior to the effective date of the rules. They provided step-by-step instructions on how to most effectively comply with Parts 653 and 654. FTA will issue updated guidelines to assist with the implementation of Part 655.

Additionally, FTA has issued numerous letters of interpretation on the rules. Public response to these letters, especially since they became available on FTA's external Web page, has been highly favorable. Employers and employees found that the letters were very helpful in explaining the rules. FTA will continue to offer interpretive guidance with respect to Part 655.

To determine compliance with the rules, FTA's Office of Safety and Security began auditing grantee drug and alcohol testing programs in March 1997. The audits quickly evolved into opportunities for FTA to provide extensive technical assistance. Through the audits, FTA has gained a better understanding of the difficulties that grantees encounter when implementing the rules. In addition, audits have shown FTA where the rules can be strengthened and improved. The impetus to combine Parts 653 and 654 is due, in no small part, to the audit program.

II. Overview of Rule

This rule combines the drug and alcohol testing rules, found at 49 CFR Parts 653 and 654, and conforms these rules to the Department's drug and alcohol testing procedures at 49 CFR Part 40. FTA believes this change will allow the program to be implemented more efficiently and will bring FTA into line with the other operating administrations that fall under the Omnibus Transportation Employee Testing Act of 1991, (Federal Aviation Administration, Federal Railroad Administration, and Federal Motor Carrier Safety Administration), as well as the two other operating administrations that have drug and alcohol testing regulations (Research and Special Programs Administration and U.S. Coast Guard).

The rule applies to direct and indirect recipients of funds under 49 U.S.C. 5307, 5309, 5311, and 23 U.S.C. 103(e)(4). It requires transit operators (employers) who receive these funds to establish and conduct a multifaceted anti-drug and alcohol misuse testing program. The regulation conditions financial assistance on the implementation of a program. Failure of an employer to develop and implement a program in compliance with this

regulation may result in the suspension of Federal transit funding.

The regulation requires the testing of safety-sensitive employees for the use of controlled substances and the misuse of alcohol; however the regulation also requires education and awareness about the problems associated with prohibited drug use and alcohol misuse. In addition, the regulation mandates that each employer have a policy statement describing its program policies and procedures. The statement must include the consequences for prohibited drug use and alcohol misuse.

The regulation specifies that safety-sensitive employees are prohibited from using five illegal substances (marijuana, cocaine, opiates, amphetamines, and phencyclidine). Safety-sensitive employees are also prohibited from misusing alcohol. The rule requires testing of safety-sensitive employees in five situations: (1) Pre-employment (including transfer to a safety-sensitive position within the organization; (2) Reasonable suspicion; (3) Random; (4) Post-accident; and (5) Return-to-duty/follow-up (periodic). Drug testing is required in all five situations. Alcohol testing is required for all situations except for pre-employment.

The rule requires the use of the Department-wide drug and alcohol testing procedures contained in 49 CFR Part 40. If a covered employee tests positive for illegal drug use or alcohol misuse or otherwise violates the rule, the employee must be removed from his or her safety-sensitive position. The employee must then be informed about education and rehabilitation programs. Should the employer decide to retain a covered employee whose test result has been verified positive, the employee must be evaluated by a substance abuse professional. Prior to returning an employee to a safety-sensitive function, the employer must ensure that the employee has successfully completed rehabilitation; the rule does not require the employer to pay for rehabilitation.

Any action on the part of FTA for noncompliance is against recipients of Federal transit funds, i.e., transit systems, metropolitan planning organizations (MPOs), states, and third party contractors that perform safety-sensitive functions. MPOs and states are affected by this regulation if they receive Federal transit funds and (1) they provide transit service or they provide funding to a subrecipient. MPOs or states that fund or manage transit providers, but do not provide transit service, must ensure that transit provider employers provide a certification of compliance.

FTA's relationship is with its grantees. Many grantees that receive transit funds operate mass transit services. Typical among these are large transit entities that receive funds under sections 49 U.S.C. 5307, 5309, and 5311. In addition, some grantees (typically states) pass Federal transit funds to smaller subrecipients within the state.

This rule eliminates the distinction between large and small operators. The term ''employer'' is now used to include both small and large operators, as well as entities providing service under contract or other arrangement with the transit operator.

III. Section-by-Section Discussion of the Comments

In this section, FTA will discuss the differences between the rules in Parts 653 and 654 and the final rule in Part 655. The responses to comments on each section are also included herein. There is no discussion for sections that have remained substantially the same. FTA also did not discuss comments that addressed Department-wide issues, which are more properly addressed in Part 40, or issues that were beyond the scope of the NPRM.

FTA received 84 comments in response to the NPRM. The breakdown among commenter categories follows:

Nonprofits, and special transit providers: 10
City and County transit providers: 19
State agencies: 20
Labor unions: 3
Trade associations: 9
Individual citizens: 12
Private businesses: 11.

FTA considered all comments filed in a timely manner, as well as all statements and material presented at the public meetings on the NPRM.

Subpart A—General

A. Definitions (§ 655.4)

Employer: In the NPRM, FTA proposed that, in addition to direct recipients of FTA funding, the term ''employer'' include state recipients that pass the money to subrecipients and grantees that have contractors performing transit operations. The definition change was proposed to provide states and grantees access to covered employees' drug and alcohol test records in order to certify compliance with FTA drug and alcohol testing rules by subrecipients and contractors.

FTA received a significant number of comments regarding the designation of states as employers. Several states were concerned that being named an employer in order to access drug and alcohol records would have legal and technical implications that may expose the state to potential litigation. States were also concerned that they may become the warehouse of records and be responsible for responding to potential employers requesting information that is required under 49 CFR 40.25. Grantees that utilize contractors to provide transit services offered similar concerns. Regardless, a significant number of commenters acknowledged the necessity of having access to test results of covered employees since Subpart I requires recipients to certify that their contractors and/or subrecipients are complying with the drug and alcohol testing program. Numerous commenters stated that this objective could be accomplished by amending 49 CFR 655.73—Access to Facilities and Records.

FTA Response. FTA agrees with the commenters and has remedied this situation with the addition of paragraph 49 CFR 655.73 (i). An employer may disclose drug and alcohol testing information required to be maintained under this part only to the state oversight agency or grantee required to certify to FTA compliance with the drug and alcohol testing procedures at 49 CFR Parts 40 and 655.

Although several commenters indicated that law enforcement agencies should have access to records maintained under this part upon request, FTA recognizes that individual privacy rights require limited dissemination of this information. This section does not authorize release of information maintained under this part to a law enforcement agency based solely on the request of the law enforcement agency.

Second chance policy: FTA proposed adding this definition to the rule with the understanding that grantees have the discretion to adopt a second chance policy, i.e., a policy allowing an employee (who has previously violated the Federal drug and/or alcohol regulations) to return to a safety-sensitive position after completing rehabilitation.

FTA received a limited number of comments on this subject. A few commenters expressed appreciation for the definition while most questioned the necessity for its inclusion since it is the employer's discretion to implement a ''second chance policy''.

FTA Response. FTA opts not to include ''second chance policy'' under definitions at this time. Since the decision to retain a covered employee is within the discretion of the employer, the phrase will not be defined in the final rule.

Taxi cab drivers and other transportation providers: FTA requested comments regarding its guidance and policy relating to this category of contractors. According to FTA policy, drug and alcohol testing rules do not apply to taxi cab drivers when patrons (using publicly subsidized vouchers) or transportation providers can choose from a variety of taxicab operators.

A number of commenters on this subject expressed concern that many rural and small urban communities have limited availability of taxi service. One commenter questioned FTA's regulatory authority to include taxi operators under the drug and alcohol testing rule. Other commenters indicated that a taxi operator is performing a safety-sensitive function whether the patron or the provider selects the taxi service and should be subject to the rule.

FTA Response. The intent of FTA's regulatory scheme is not to impose Federal regulations on the taxi industry; however, taxi companies that contract with transportation service providers receiving Federal transit funds are subject to compliance with the drug and alcohol rules. FTA policy continues to recognize the practical difficulty of administering a drug and alcohol testing program to taxi companies that only incidentally provide transit service. Therefore, the drug and alcohol testing rules apply when the transit provider enters into a contract with one or more entities to provide taxi service. The rules do not apply when the patron (using subsidized vouchers) selects the taxi company that provides the transit service. This guidance reflects the FTA Master Agreement, which requires recipients to include appropriate clauses in third party contracts requiring contractors to comply with applicable Federal requirements. It also recognizes the practical difficulty of administering a drug and alcohol testing program to entities that only incidentally provide taxi service on behalf of a transportation service provider.

Dispatchers. FTA requested comments on the duties and responsibilities of dispatchers in the different transit systems. The objective was to determine whether the duties and responsibilities vary significantly enough to warrant modification of the current rule.

A significant number of commenters indicated that bus dispatchers whose duties are of an administrative nature and primarily communicate directions to a bus operator do not perform a safety-sensitive function. Other commenters indicated that their dispatchers did indeed perform safety-sensitive functions, including but not limited to responding to emergency situations and should remain subject to the rules. The majority of the commenters in rural and small urban areas indicated that their dispatchers did not perform safety-sensitive functions.

FTA Response. The comments confirm that bus dispatchers perform a myriad of duties depending on the employer. FTA's rules apply to anyone who performs a safety-sensitive function, which includes the control of the ''dispatch or movement of a revenue service vehicle.''

Since each employer uses its own terminology to describe job categories that involve safety-sensitive functions, each employer must continue to decide whether a particular employee performs any of the functions listed in the definition of ''safety-sensitive function,'' including bus dispatchers. As noted in previous guidance, the key consideration remains the type of work performed rather than any particular job title. Based on the comments received, FTA will not attempt a universal definition of ''dispatchers'' at this time. Instead, FTA will allow each employer to determine whether a particular dispatcher performs or may perform a safety-sensitive function.

Maintenance contractors. In the NPRM, FTA reiterated that maintenance contractors that perform safety-sensitive functions are subject to the drug and alcohol testing rules, for the reasons noted in the preamble to the 1999 rule change, i.e., fairness and safety (64 FR 425, January 5, 1999). Most comments on this subject concerned the difficulty employers have in requiring maintenance contractors to implement a drug and alcohol program. Much of the discussion related to the difficulty in finding maintenance contractors willing to comply with the drug and alcohol testing requirements, particularly where the maintenance contractor provides service on an occasional basis. A number of commenters offered that maintenance shops cannot afford to implement an ongoing program for the amount of transit-related business generated. As a result, this would severely restrict the grantee/subrecipient's ability to properly maintain FTA-funded vehicles. The majority of comments urged the FTA to completely exempt maintenance contractors from the drug and alcohol testing regulations.

Several urban grantees commented on the fact that the type of work they are contracting out is often performed by small shops focusing on a very narrow repair area. These maintenance contractors have limited administrative staff, which causes them difficulty in administering a drug and alcohol program.

FTA Response. FTA recognizes these concerns, but also recognizes the public safety interest inherent in testing safety-sensitive employees. FTA has developed a middle ground to alleviate some of the problems associated with this issue. FTA still recognizes that recipients funded with 49 U.S.C. 5311 funds and which contract out maintenance service are excluded from the drug and alcohol testing rules. In addition, recipients of Federal transit funds under 49 U.S.C. 5307 and 5309 in an area less than 200,000 in population and which contract out such services are no longer required to comply with Part 655. Also, maintenance providers of safety-sensitive functions for a grantee on an ad hoc or one-time basis are not required to comply.

Volunteers. FTA proposed to clarify when volunteers are covered employees subject to the drug and alcohol testing rules. Most commenters indicated that the proposed language needed further clarification.

FTA Response. FTA has reviewed the proposed language and amends the definition of covered employee by deleting reference to the volunteers' ''expectation of in-kind or tangible benefits.'' Instead, a volunteer is deemed a covered employee when he or she receives remuneration in excess of their actual personal expenses incurred while performing the volunteer service.

B. Stand-Down Waivers for Drug Testing (655.5)

FTA proposed procedures on stand-down waivers to conform with 49 CFR Part 40.

Most of the commenters to this section expressed support. However, one commenter expressed opposition to the provision claiming that it undercuts the confidentiality principles inherent in the FTA's drug and alcohol testing program. Another commenter indicated that FTA should provide additional criteria not identified in 49 CFR Part 40.

FTA Response. FTA is aware of the confidentiality concerns and will carefully review each petition to determine if the facts and justification warrant a waiver. The requirements for obtaining a waiver are provided in 49 CFR 40.21. The proposed rule will be incorporated in the final rule to conform with 49 CFR Part 40.

Subpart B—Program Requirements

A. Policy Statement Contents (§ 655.15)

FTA proposed limiting information required in a Policy Statement to that

listed in section 655.15. FTA also clarified who must approve the policy. In most instances, a grantee will have a governing board that can adopt the policy. However, where there is no governing board or the governing board does not have approval authority, the highest-ranking official with authority to approve the policy may do so. FTA also noted that employers may incorporate by reference 49 CFR Part 40 in their Policy Statements, provided it is available for review by employees when requested.

Most commenters expressed support for the effort to simplify this requirement. However, one commenter noted that eliminating the requirement to address specific sections of 49 CFR Part 40 and making Part 40 available to the employee creates the potential for misunderstanding by the employee. Another commenter indicated that specific employee rights should be required in this section. A few commenters also recommended that FTA impose schedules for when the employee and supervisor training requirement should occur and the frequency with which it should be scheduled.

FTA Response. FTA believes that simplifying the contents required in the Policy Statement reduces the administrative burden while maintaining an employer's discretion to craft a Policy Statement that includes additional requirements not mandated by FTA. FTA also believes that it would be an undue burden to mandate an industry-wide training schedule. The final rule recognizes the diversity of employee-management relationships within the transit industry and also strikes a reasonable balance with the requirement for employee and supervisor training. However, a grantee may choose to include additional requirements not mandated by FTA, i.e., recurring training and employee rights. If a grantee does so, the grantee's policy shall indicate that those additional requirements are the employer's, and not FTA's. FTA also believes that it is reasonable for employers to incorporate by reference 49 CFR Part 40 in their Policy Statements and make it available for review by employees when requested.

Subpart E—Types of Testing

A. Pre-employment Drug Testing (§ 655.41)

FTA notified the public of the intent to eliminate the phrase ''hire'' in this provision of the rule. Previously, employers were required to administer a drug test and receive a negative result before hiring an employee.

FTA also notified the public of its proposal to require a pre-employment test for covered employees who are away from work for more than 90 consecutive calendar days and plan to return to a safety-sensitive function. It is FTA's intent that employers assure themselves that employees can successfully pass a drug test before returning them to safety-sensitive functions.

The majority of commenters support the change in the provision that allows a covered employee to be hired prior to receiving a negative drug test result. These comments indicated that the rule balances the employer's personnel concerns with the public safety interest by ensuring that the new covered employee is not permitted to perform a safety-sensitive function for the first time until a negative drug test result is received. However, one commenter stated that the public safety interest is better served by prohibiting the hiring of a covered employee prior to receiving a drug test result. Another comment indicated that FTA should adopt pre-employment provisions similar to the Federal Motor Carrier Safety Administration (FMCSA).

Many commenters supported clarification of the rule regarding the time required to elapse before an absent covered employee should take another pre-employment drug test. A majority of rural and small urban employers are in favor of this rule because they employ seasonal and temporary workers. A few comments indicated that there is no basis to retest a covered employee after a 90-day absence. However, one employer indicated that a pre-employment test should be administered after 90 days regardless of whether the employee was in the employer's random pool or not. Another commenter indicated that pre-employment testing should be administered following consecutive absences as short as 30 days.

FTA Response. FTA has reviewed the comments and will incorporate the NPRM language into the final rule. FTA believes that deleting the phrase ''hire'' in this section provides an employer with the discretion to administer a pre-employment drug test anytime before the employee first performs a safety-sensitive function. FTA also believes the 90-day period is reasonable. It gives the employer the discretion to decide whether or not the covered employee is retained in the random pool during his or her absence. If the employee is retained in the random pool, then pre-employment testing is not required. In determining whether to retain the employee in the random pool, one consideration is the likelihood of the employee's return to perform safety-sensitive functions.

B. Pre-Employment Alcohol Testing (§ 655.42)

FTA noted in the NPRM that its pre-employment alcohol testing requirements were suspended due to a court decision and subsequent legislation. Most commenters indicated that FTA's new rule should also omit the pre-employment alcohol testing provisions, primarily because alcohol consumption is a legal activity. Others indicated that since pre-employment testing would not be conducted under FTA authority, this section should not be included in the final rule.

FTA Response. The NPRM language is included in the final rule to conform with the other DOT agency drug and alcohol testing programs. All six DOT agencies with testing programs are adding this section to their respective rules. This section allows, but does not require, employers to conduct pre-employment alcohol testing. If an employer chooses to conduct pre-employment alcohol testing, the employer must conduct the testing in accordance with all of the requirements of 49 CFR Part 40.

C. Reasonable Suspicion Testing (§ 655.43)

Several commenters responding to this section indicated that FTA should not interfere with an employer's ability to require two or more trained supervisors to participate and/or agree on referring an employee for reasonable suspicion testing. One commenter indicated that employers should be allowed to authorize other personnel to make reasonable suspicion testing observations similar to the FMCSA. Two commenters indicated that this testing requirement should not be required at all because the consumption of alcohol is legal. Other commenters indicated that provisions found in 49 CFR 654.37(c) and (d) should be incorporated in the final rule.

FTA Response. FTA believes that the public safety interest is furthered with the inclusion of this requirement and the final rule is amended to include the language of 49 CFR 654.37(c) and (d). FTA also notes that the proposed bar to an employer requiring two or more trained supervisors to make such referrals is not included in the final rule. FTA also agrees that an employer should be permitted to authorize and train other company officers to make reasonable suspicion observations;

therefore this section and section 655.14 of subpart B are amended accordingly.

D. Post-Accident Testing (§ 655.44)

FTA noted in the NPRM that its post-accident testing regulation was previously amended to allow an employer, in extremely limited circumstances, to use the post-accident test results administered by local law enforcement only when the employer is unable to perform a post-accident test within the required time frame.

Of the few comments received on this section, most indicated support for the limited exception to use post-accident test results from local law enforcement. However, a commenter indicated that the rule does not state that this provision is to be used in limited circumstances. Another commenter stated that the employer should not be permitted to use post-accident test results administered by local law enforcement because the standards for these tests may be less than those imposed by DOT. One commenter stated that FTA should not require post-accident testing when it is also required by FMCSA.

FTA Response. FTA noted that the proposed rule did not state the limited exception under which an employer may use the test results of a law enforcement agency. The final rule is amended to indicate that an employer may use the post-accident test results of a law enforcement agency when the employer is unable to test within the required time frame established by FTA and the test is performed to the applicable standards of the entity authorized to administer the drug or alcohol test. FTA and FMCSA are amending their respective post-accident testing rule to eliminate the requirement for duplicative post-accident testing of operators.

E. Random Testing (§ 655.45)

FTA reiterated in the NPRM that a primary purpose of random testing is deterrence. Deterrence is most effectively achieved with random, unpredictable drug and alcohol testing that is conducted throughout all workdays and hours of service.

Although the majority of commenters supported the concept of random drug testing, a significant number indicated that employers in rural areas have an increased burden complying with this provision. They have difficulty in obtaining testing services after normal business hours within their areas and/or because of distances between testing service providers and the employer. Four commenters also noted that the NPRM incorrectly stated the current random alcohol testing rate.

FTA Response. The proposed language is incorporated in the final rule with some modification. The concern reflected by employers in rural areas is noted; however, FTA believes that the public safety interest is promoted with random testing that is truly random and unpredictable. However, FTA believes that requiring random testing to be conducted at least quarterly strikes a reasonable balance while considering the rule's impact on employers in rural areas. Additionally, FTA is reviewing the recommendation to allow individual rural transit systems to apply to have its random testing rate based on its individual performance and program instead of industry-wide data.

Paragraph (a) of this section is amended to read 10% instead of 25%. Paragraph (i) of this section is also amended to reflect that random testing for alcohol misuse is subject to safety-sensitive performance limitations while testing for drug use is permitted anytime during the workday.

Subpart H—Administrative Requirements

A. Retention of Records (§ 655.71) and Reporting Results in a Management Information System (§ 655.72)

The NPRM proposed changing FTA's Management Information System (MIS) reporting requirement from census reporting to stratified random sampling because it now has an accurate portrait of the current state of drug and alcohol testing (including positive rates) in the transit industry. Most commenters indicated that FTA's intent to reduce the paperwork requirement is better achieved by using technology (e.g., web based/electronic submission). A few commenters stated that the proposed rule does not reduce their administrative burden. Most commenters indicated that sampling reduces some of the burden on rural transit systems; however, a commenter noted that states are still required to collect subrecipient's data. Other commenters indicated that FTA should have one uniform period for record retention.

FTA Response. FTA believes sampling will reduce the paperwork burden on a portion of the industry while still maintaining a high confidence level in the results. Transit employers are still required to prepare an MIS form annually; however, they will only be required to submit an MIS form when requested by FTA. However, FTA's record retention time periods reflect those of the other DOT modes for administrative uniformity. FTA will review the feasibility of web-based submission of data and will issue further guidance on this issue.

B. Access to Facilities and Records (§ 655.73)

As previously discussed in section 655.4 of subpart A, FTA received a number of comments indicating that states should not be included under the definition of ''employer'' in order to gain access to records. Many commenters also objected to state regulatory agencies and law enforcement agencies having independent access to employee records. The majority of comments indicated that only those state agencies and grantees with oversight responsibilities and which are required to certify compliance should have access to the employee's drug and alcohol testing information.

FTA Response. The final rule is amended by adding paragraph (i) to this section. An employer may release information to the state agency or grantee with oversight responsibility of FTA transit funds which is required to certify compliance under this part.

IV. Effect of the Americans With Disabilities Act of 1990 on Alcohol Testing Programs

Title I of the Americans With Disabilities Act of 1990 (ADA) focuses on employers' responsibilities toward employees with disabilities. According to Title I, an employer must provide reasonable accommodations for work for persons with disabilities. Some covered workers are considered persons with disabilities for purposes of protection under the ADA. This issue was treated more fully in the 1994 DOT-wide preamble (59 FR 7302, 7311–7314, February 15, 1994).

V. Regulatory Process Matters

A. Executive Order 12866

FTA has evaluated the industry costs and benefits of this rule, which require that transit industry personnel who perform safety-sensitive functions be covered by a program to control illegal drug abuse and alcohol misuse in mass transportation operations. This rule makes no noteworthy substantive changes. Any incremental costs are negligible, and the policy and economic impact will have no significant effect.

B. Departmental Significance

This rule is a ''non-significant regulation'' as defined by the Department's Regulatory Policies and Procedures because, while it involves an important Departmental policy that is

likely to generate a great deal of public interest, in the larger scheme, it is simply a combination of two existing regulations (49 CFR Parts 653 and 654). It also conforms FTA's drug and alcohol testing regulations with the Department's drug and alcohol testing regulations (49 CFR Part 40), to which FTA grantees already are subject.

C. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601–612), FTA has made a preliminary assessment of the possible effects of the rule on small businesses. To the extent possible, FTA has made efforts to acknowledge the differences between small and large entities, and has endeavored to make accommodations when possible. Experience with Parts 653 and 654 has shown that the rule has had a significant impact on a substantial number of small entities. FTA believes that this new rule will provide greater clarity and ease of implementation for small entities.

D. Paperwork Reduction Act

This rule includes information collection requirements subject to the Paperwork Reduction Act of 1995 (PWRA) (44 U.S.C. 3501, *et. seq.*) The Office of Management and Budget has approved FTA's PWRA request for Parts 653 and 654. This rule includes the same information collection devices; therefore, FTA believes it already has OMB approval. The Management Information System (MIS) forms currently required by Parts 653 and 654 may be modified in the future, but will continue to be required by FTA, without changes, under Part 655.

E. Executive Order 13132

This action has been reviewed under Executive Order 13132 on Federalism. FTA has determined that this action has significant Federalism implications to warrant a Federalism assessment. However, FTA has limited discretion because this rulemaking is mandated by Congress in the Omnibus Transportation Employee Testing Act of 1991.

The 1991 legislation mandated FTA to issue regulations requiring grantees of funds under 49 U.S.C. 5307, 5309, and 5311, and 23 U.S.C. 103(e)(4) to test their safety-sensitive employees for the use of drugs and the misuse of alcohol in violation of law or Federal regulation.

Before passage of the Omnibus Transportation Employee Testing Act of 1991, safety issues were largely handled as a local matter. This Act clarifies the Federal role by including specific Federal pre-emption language. This Act also makes it clear that, in the area of substance abuse testing, Federal regulations are to take precedence over any inconsistent State or local specifications.

Although Congress has pre-empted State or local law, FTA has preserved the role of local entities in mass transit safety. This regulation does not disturb testing programs which were created by virtue of a grantee's own authority and which are not inconsistent with this regulation.

F. Other Executive Orders

There are a number of other Executive Orders that can affect rulemakings. These include Executive Orders 13084 (Consultation and Coordination with Indian Tribal Governments), 12988 (Civil Justice Reform), 12875 (Enhancing the Intergovernmental Partnership), 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights), 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations), 13045 (Protection of Children from Environmental Health Risks and Safety Risks), and 12889 (Implementation of North American Free Trade Agreement). We have considered these Executive Orders in the content of this rule, and we believe that the rule does not directly affect the matters covered by the Executive Orders.

List of Subjects

49 CFR Part 653

Drug abuse, Drug testing, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation.

49 CFR Part 654

Alcohol abuse, Drug testing, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation.

49 CFR Part 655

Alcohol abuse, Drug abuse, Drug testing, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation.

For the reasons set forth in the preamble and under the authority of 49 U.S.C. 5331, the agency amends Chapter VI of Title 49 of the Code of Federal Regulations as set forth below:

PART 653—[REMOVED]

1. Remove part 653.

PART 654—[REMOVED]

2. Remove part 654.

3. Add part 655 to read as follows:

PART 655—PREVENTION OF ALCOHOL MISUSE AND PROHIBITED DRUG USE IN TRANSIT OPERATIONS

Subpart A—General

Sec.

Subpart B—Program Requirements

Subpart C—Prohibited Drug Use

Subpart D—Prohibited Alcohol Use

Subpart E—Types of Testing

Subpart F—Drug and Alcohol Testing Procedures

Subpart G—Consequences

Authority: 49 U.S.C. 5331; 49 CFR 1.51.

Subpart A—General

§ 655.1 Purpose.

The purpose of this part is to establish programs to be implemented by employers that receive financial assistance from the Federal Transit Administration (FTA) and by contractors of those employers, that are designed to help prevent accidents, injuries, and fatalities resulting from the misuse of alcohol and use of prohibited drugs by employees who perform safety-sensitive functions.

§ 655.2 Overview.

(a) This part includes nine subparts. Subpart A of this part covers the general requirements of FTA's drug and alcohol testing programs. Subpart B of this part specifies the basic requirements of each employer's alcohol misuse and prohibited drug use program, including the elements required to be in each employer's testing program. Subpart C of this part describes prohibited drug use. Subpart D of this part describes prohibited alcohol use. Subpart E of this part describes the types of alcohol and drug tests to be conducted. Subpart F of this part addresses the testing procedural requirements mandated by the Omnibus Transportation Employee Testing Act of 1991, and as required in 49 CFR Part 40. Subpart G of this part lists the consequences for covered employees who engage in alcohol misuse or prohibited drug use. Subpart H of this part contains administrative matters, such as reports and recordkeeping requirements. Subpart I of this part specifies how a recipient certifies compliance with the rule.

(b) This part must be read in conjunction with 49 CFR Part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs.

§ 655.3 Applicability.

(a) Except as specifically excluded in paragraph (b) of this section, this part applies to:

(1) Each recipient and subrecipient receiving Federal assistance under:

(i) 49 U.S.C. 5307, 5309, or 5311; or

(ii) 23 U.S.C. 103(e)(4); and

(2) Any contractor of a recipient or subrecipient of Federal assistance under:

(i) 49 U.S.C. 5307, 5309, or 5311; or

(ii) 23 U.S.C. 103(e)(4).

(b) A recipient operating a railroad regulated by the Federal Railroad Administration (FRA) shall follow 49 CFR Part 219 and § 655.83 for its railroad operations, and shall follow this part for its non-railroad operations, if any.

§ 655.4 Definitions.

For this part, the terms listed in this section have the following definitions. The definitions of additional terms used in this part but not listed in this section can be found in 49 CFR Part 40.

Accident means an occurrence associated with the operation of a vehicle, if as a result:

(1) An individual dies; or

(2) An individual suffers bodily injury and immediately receives medical treatment away from the scene of the accident; or

(3) With respect to an occurrence in which the mass transit vehicle involved is a bus, electric bus, van, or automobile, one or more vehicles (including non-FTA funded vehicles) incurs disabling damage as the result of the occurrence and such vehicle or vehicles are transported away from the scene by a tow truck or other vehicle; or

(4) With respect to an occurrence in which the mass transit vehicle involved is a rail car, trolley car, trolley bus, or vessel, the mass transit vehicle is removed from operation.

Administrator means the Administrator of the Federal Transit Administration or the Administrator's designee.

Anti-drug program means a program to detect and deter the use of prohibited drugs as required by this part.

Certification means a recipient's written statement, authorized by the organization's governing board or other authorizing official that the recipient has complied with the provisions of this part. (See § 655.82 and § 655.83 for certification requirements.)

Contractor means a person or organization that provides a safety-sensitive service for a recipient, subrecipient, employer, or operator consistent with a specific understanding or arrangement. The understanding can be a written contract or an informal arrangement that reflects an ongoing relationship between the parties.

Covered employee means a person, including an applicant or transferee, who performs or will perform a safety-sensitive function for an entity subject to this part. A volunteer is a covered employee if:

(1) The volunteer is required to hold a commercial driver's license to operate the vehicle; or

(2) The volunteer performs a safety-sensitive function for an entity subject to this part and receives remuneration in excess of his or her actual expenses incurred while engaged in the volunteer activity.

Disabling damage means damage that precludes departure of a motor vehicle from the scene of the accident in its usual manner in daylight after simple repairs.

(1) *Inclusion.* Damage to a motor vehicle, where the vehicle could have been driven, but would have been further damaged if so driven.

(2) *Exclusions.* (i) Damage that can be remedied temporarily at the scene of the accident without special tools or parts.

(ii) Tire disablement without other damage even if no spare tire is available.

(iii) Headlamp or tail light damage.

(iv) Damage to turn signals, horn, or windshield wipers, which makes the vehicle inoperable.

DOT or *The Department* means the United States Department of Transportation.

DOT agency means an agency (or ''operating administration'') of the United States Department of Transportation administering regulations requiring drug and alcohol testing. See 14 CFR part 121, appendices I and J; 33 CFR part 95; 46 CFR parts 4, 5, and 16; and 49 CFR parts 199, 219, 382, and 655.

Employer means a recipient or other entity that provides mass transportation service or which performs a safety-sensitive function for such recipient or other entity. This term includes subrecipients, operators, and contractors.

FTA means the Federal Transit Administration, an agency of the U.S. Department of Transportation.

Performing (a safety-sensitive function) means a covered employee is considered to be performing a safety-sensitive function and includes any period in which he or she is actually

performing, ready to perform, or immediately available to perform such functions.

Positive rate means the sum of the annual number of positive results for random drug tests conducted under this part plus the annual number of refusals to submit to a random drug test authorized under this part divided by the sum of the annual number of random drug tests conducted under this part plus the annual number of refusals to submit to a random drug test authorized under this part.

Railroad means:

(1) All forms of non-highway ground transportation that run on rails or electromagnetic guideways, including:

(i) Commuter or other short-haul rail passenger service in a metropolitan or suburban area, as well as any commuter rail service that was operated by the Consolidated Rail Corporation as of January 1, 1979; and

(ii) High speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads.

(2) Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

Recipient means an entity receiving Federal financial assistance under 49 U.S.C. 5307, 5309, or 5311; or under 23 U.S.C. 103(e)(4).

Refuse to submit means any circumstance outlined in 49 CFR 40.191 and 40.261.

Safety-sensitive function means any of the following duties, when performed by employees of recipients, subrecipients, operators, or contractors:

(1) Operating a revenue service vehicle, including when not in revenue service;

(2) Operating a nonrevenue service vehicle, when required to be operated by a holder of a Commercial Driver's License;

(3) Controlling dispatch or movement of a revenue service vehicle;

(4) Maintaining (including repairs, overhaul and rebuilding) a revenue service vehicle or equipment used in revenue service. This section does not apply to the following: an employer who receives funding under 49 U.S.C. 5307 or 5309, is in an area less than 200,000 in population, and contracts out such services; or an employer who receives funding under 49 U.S.C. 5311 and contracts out such services;

(5) Carrying a firearm for security purposes.

Vehicle means a bus, electric bus, van, automobile, rail car, trolley car, trolley bus, or vessel. A mass transit vehicle is a vehicle used for mass transportation or for ancillary services.

Violation rate means the sum of the annual number of results from random alcohol tests conducted under this part that have alcohol concentrations of .04 or greater plus the annual number of refusals to submit to alcohol tests authorized under this part, divided by the sum of the annual number of random alcohol tests conducted under this part plus the annual number of refusals to submit to a drug test authorized under this part.

§ 655.5 Stand-down waivers for drug testing.

(a) An employer subject to this part may petition the FTA for a waiver allowing the employer to stand down, per 49 CFR Part 40, an employee following a report of a laboratory confirmed positive drug test or refusal, pending the outcome of the verification process.

(b) Each petition for a waiver must be in writing and include facts and justification to support the waiver. Each petition must satisfy the requirements for obtaining a waiver, as provided in 49 CFR 40.21.

(c) Each petition for a waiver must be submitted to the Office of Safety and Security, Federal Transit Administration, U.S. Department of Transportation, 400 Seventh Street, SW. Washington, DC 20590.

(d) The Administrator may grant a waiver subject to 49 CFR 40.21(d).

§ 655.6 Preemption of state and local laws.

(a) Except as provided in paragraph (b) of this section, this part preempts any state or local law, rule, regulation, or order to the extent that:

(1) Compliance with both the state or local requirement and any requirement in this part is not possible; or

(2) Compliance with the state or local requirement is an obstacle to the accomplishment and execution of any requirement in this part.

(b) This part shall not be construed to preempt provisions of state criminal laws that impose sanctions for reckless conduct attributed to prohibited drug use or alcohol misuse leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees or employers or to the general public.

§ 655.7 Starting date for testing programs.

An employer must have an anti-drug and alcohol misuse testing program in place by the date the employer begins operations.

Subpart B—Program Requirements

§ 655.11 Requirement to establish an anti-drug use and alcohol misuse program.

Each employer shall establish an anti-drug use and alcohol misuse program consistent with the requirements of this part.

§ 655.12 Required elements of an anti-drug use and alcohol misuse program.

An anti-drug use and alcohol misuse program shall include the following:

(a) A statement describing the employer's policy on prohibited drug use and alcohol misuse in the workplace, including the consequences associated with prohibited drug use and alcohol misuse. This policy statement shall include all of the elements specified in § 655.15. Each employer shall disseminate the policy consistent with the provisions of § 655.16.

(b) An education and training program which meets the requirements of § 655.14.

(c) A testing program, as described in Subparts C and D of this part, which meets the requirements of this part and 49 CFR Part 40.

(d) Procedures for referring a covered employee who has a verified positive drug test result or an alcohol concentration of 0.04 or greater to a Substance Abuse Professional, consistent with 49 CFR Part 40.

§ 655.13 [Reserved]

§ 655.14 Education and training programs.

Each employer shall establish an employee education and training program for all covered employees, including:

(a) *Education.* The education component shall include display and distribution to every covered employee of: informational material and a community service hot-line telephone number for employee assistance, if available.

(b) *Training.* (1) *Covered employees.* Covered employees must receive at least 60 minutes of training on the effects and consequences of prohibited drug use on personal health, safety, and the work environment, and on the signs and symptoms that may indicate prohibited drug use.

(2) *Supervisors.* Supervisors and/or other company officers authorized by the employer to make reasonable suspicion determinations shall receive at least 60 minutes of training on the physical, behavioral, and performance indicators of probable drug use and at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.

§ 655.15 Policy statement contents.

The local governing board of the employer or operator shall adopt an anti-drug and alcohol misuse policy statement. The statement must be made available to each covered employee, and shall include the following:

(a) The identity of the person, office, branch and/or position designated by the employer to answer employee questions about the employer's anti-drug use and alcohol misuse programs.

(b) The categories of employees who are subject to the provisions of this part.

(c) Specific information concerning the behavior and conduct prohibited by this part.

(d) The specific circumstances under which a covered employee will be tested for prohibited drugs or alcohol misuse under this part.

(e) The procedures that will be used to test for the presence of illegal drugs or alcohol misuse, protect the employee and the integrity of the drug and alcohol testing process, safeguard the validity of the test results, and ensure the test results are attributed to the correct covered employee.

(f) The requirement that a covered employee submit to drug and alcohol testing administered in accordance with this part.

(g) A description of the kind of behavior that constitutes a refusal to take a drug or alcohol test, and a statement that such a refusal constitutes a violation of the employer's policy.

(h) The consequences for a covered employee who has a verified positive drug or a confirmed alcohol test result with an alcohol concentration of 0.04 or greater, or who refuses to submit to a test under this part, including the mandatory requirements that the covered employee be removed immediately from his or her safety-sensitive function and be evaluated by a substance abuse professional, as required by 49 CFR Part 40.

(i) The consequences, as set forth in § 655.35 of subpart D, for a covered employee who is found to have an alcohol concentration of 0.02 or greater but less than 0.04.

(j) The employer shall inform each covered employee if it implements elements of an anti-drug use or alcohol misuse program that are not required by this part. An employer may not impose requirements that are inconsistent with, contrary to, or frustrate the provisions of this part.

§ 655.16 Requirement to disseminate policy.

Each employer shall provide written notice to every covered employee and to representatives of employee organizations of the employer's anti-drug and alcohol misuse policies and procedures.

§ 655.17 Notice requirement.

Before performing a drug or alcohol test under this part, each employer shall notify a covered employee that the test is required by this part. No employer shall falsely represent that a test is administered under this part.

§§ 655.18–655.20 [Reserved]

Subpart C—Prohibited Drug Use

§ 655.21 Drug testing.

(a) An employer shall establish a program that provides testing for prohibited drugs and drug metabolites in the following circumstances: pre-employment, post-accident, reasonable suspicion, random, and return to duty/follow-up.

(b) When administering a drug test, an employer shall ensure that the following drugs are tested for:

(1) Marijuana;

(2) Cocaine;

(3) Opiates;

(4) Amphetamines; and

(5) Phencyclidine.

(c) Consumption of these products is prohibited at all times.

§§ 655.22–655.30 [Reserved]

Subpart D—Prohibited Alcohol Use

§ 655.31 Alcohol testing.

(a) An employer shall establish a program that provides for testing for alcohol in the following circumstances: post-accident, reasonable suspicion, random, and return to duty/follow-up. An employer may also conduct pre-employment alcohol testing.

(b) Each employer shall prohibit a covered employee, while having an alcohol concentration of 0.04 or greater, from performing or continuing to perform a safety-sensitive function.

§ 655.32 On duty use.

Each employer shall prohibit a covered employee from using alcohol while performing safety-sensitive functions. No employer having actual knowledge that a covered employee is using alcohol while performing safety-sensitive functions shall permit the employee to perform or continue to perform safety-sensitive functions.

§ 655.33 Pre-duty use.

(a) *General.* Each employer shall prohibit a covered employee from using alcohol within 4 hours prior to performing safety-sensitive functions. No employer having actual knowledge that a covered employee has used alcohol within four hours of performing a safety-sensitive function shall permit the employee to perform or continue to perform safety-sensitive functions.

(b) *On-call employees.* An employer shall prohibit the consumption of alcohol for the specified on-call hours of each covered employee who is on-call. The procedure shall include:

(1) The opportunity for the covered employee to acknowledge the use of alcohol at the time he or she is called to report to duty and the inability to perform his or her safety-sensitive function.

(2) The requirement that the covered employee take an alcohol test, if the covered employee has acknowledged the use of alcohol, but claims ability to perform his or her safety-sensitive function.

§ 655.34 Use following an accident.

Each employer shall prohibit alcohol use by any covered employee required to take a post-accident alcohol test under § 655.44 for eight hours following the accident or until he or she undergoes a post-accident alcohol test, whichever occurs first.

§ 655.35 Other alcohol-related conduct.

(a) No employer shall permit a covered employee tested under the provisions of subpart E of this part who is found to have an alcohol concentration of 0.02 or greater but less than 0.04 to perform or continue to perform safety-sensitive functions, until:

(1) The employee's alcohol concentration measures less than 0.02; or

(2) The start of the employee's next regularly scheduled duty period, but not less than eight hours following administration of the test.

(b) Except as provided in paragraph (a) of this section, no employer shall take any action under this part against an employee based solely on test results showing an alcohol concentration less than 0.04. This does not prohibit an employer with authority independent of this part from taking any action otherwise consistent with law.

Subpart E—Types of Testing

§ 655.41 Pre-employment drug testing.

(a)(1) Before allowing a covered employee or applicant to perform a safety-sensitive function for the first time, the employer must ensure that the employee takes a pre-employment drug test administered under this part with a verified negative result. An employer may not allow a covered employee, including an applicant, to perform a safety-sensitive function unless the

employee takes a drug test administered under this part with a verified negative result.

(2) When a covered employee or applicant has previously failed or refused a pre-employment drug test administered under this part, the employee must provide the employer proof of having successfully completed a referral, evaluation and treatment plan as described in § 655.62.

(b) An employer may not transfer an employee from a nonsafety-sensitive function to a safety-sensitive function until the employee takes a pre-employment drug test administered under this part with a verified negative result.

(c) If a pre-employment drug test is canceled, the employer shall require the covered employee or applicant to take another pre-employment drug test administered under this part with a verified negative result.

(d) When a covered employee or applicant has not performed a safety-sensitive function for 90 consecutive calendar days regardless of the reason, and the employee has not been in the employer's random selection pool during that time, the employer shall ensure that the employee takes a pre-employment drug test with a verified negative result.

§ 655.42 Pre-employment alcohol testing.

An employer may, but is not required to, conduct pre-employment alcohol testing under this part. If an employer chooses to conduct pre-employment alcohol testing, the employer must comply with the following requirements:

(a) The employer must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions).

(b) The employer must treat all covered employees performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (i.e., you must not test some covered employees and not others).

(c) The employer must conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test.

(d) The employer must conduct all pre-employment alcohol tests using the alcohol testing procedures set forth in 49 CFR Part 40.

(e) The employer must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates an alcohol concentration of less than 0.02.

§ 655.43 Reasonable suspicion testing.

(a) An employer shall conduct a drug and/or alcohol test when the employer has reasonable suspicion to believe that the covered employee has used a prohibited drug and/or engaged in alcohol misuse.

(b) An employer's determination that reasonable suspicion exists shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the covered employee. A supervisor(s), or other company official(s) who is trained in detecting the signs and symptoms of drug use and alcohol misuse must make the required observations.

(c) Alcohol testing is authorized under this section only if the observations required by paragraph (b) of this section are made during, just preceding, or just after the period of the workday that the covered employee is required to be in compliance with this part. An employer may direct a covered employee to undergo reasonable suspicion testing for alcohol only while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

(d) If an alcohol test required by this section is not administered within two hours following the determination under paragraph (b) of this section, the employer shall prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered. If an alcohol test required by this section is not administered within eight hours following the determination under paragraph (b) of this section, the employer shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

§ 655.44 Post-accident testing.

(a) Accidents. (1) *Fatal accidents.* (i) As soon as practicable following an accident involving the loss of human life, an employer shall conduct drug and alcohol tests on each surviving covered employee operating the mass transit vehicle at the time of the accident. Post-accident drug and alcohol testing of the operator is not required under this section if the covered employee is tested under the fatal accident testing requirements of the Federal Motor Carrier Safety Administration rule 49 CFR 389.303(a)(1) or (b)(1).

(ii) The employer shall also drug and alcohol test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(2) *Nonfatal accidents.* (i) As soon as practicable following an accident not involving the loss of human life in which a mass transit vehicle is involved, the employer shall drug and alcohol test each covered employee operating the mass transit vehicle at the time of the accident unless the employer determines, using the best information available at the time of the decision, that the covered employee's performance can be completely discounted as a contributing factor to the accident. The employer shall also drug and alcohol test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(ii) If an alcohol test required by this section is not administered within two hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered. If an alcohol test required by this section is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and maintain the record. Records shall be submitted to FTA upon request of the Administrator.

(b) An employer shall ensure that a covered employee required to be drug tested under this section is tested as soon as practicable but within 32 hours of the accident.

(c) A covered employee who is subject to post-accident testing who fails to remain readily available for such testing, including notifying the employer or the employer representative of his or her location if he or she leaves the scene of the accident prior to submission to such test, may be deemed by the employer to have refused to submit to testing.

(d) The decision not to administer a drug and/or alcohol test under this section shall be based on the employer's determination, using the best available information at the time of the determination that the employee's performance could not have contributed to the accident. Such a decision must be documented in detail, including the decision-making process used to reach the decision not to test.

(e) Nothing in this section shall be construed to require the delay of necessary medical attention for the injured following an accident or to prohibit a covered employee from

leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

(f) The results of a blood, urine, or breath test for the use of prohibited drugs or alcohol misuse, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section provided such test conforms to the applicable Federal, State, or local testing requirements, and that the test results are obtained by the employer. Such test results may be used only when the employer is unable to perform a post-accident test within the required period noted in paragraphs (a) and (b) of this section.

§ 655.45 Random testing.

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random drug testing shall be 50 percent of covered employees; the random alcohol testing rate shall be 10 percent. As provided in paragraph (b) of this section, this rate is subject to annual review by the Administrator.

(b) The Administrator's decision to increase or decrease the minimum annual percentage rate for random drug and alcohol testing is based, respectively, on the reported positive drug and alcohol violation rates for the entire industry. All information used for this determination is drawn from the drug and alcohol Management Information System (MIS) reports required by this part. In order to ensure reliability of the data, the Administrator shall consider the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry's verified positive results and violation rates. Each year, the Administrator will publish in the **Federal Register** the minimum annual percentage rates for random drug and alcohol testing of covered employees. The new minimum annual percentage rate for random drug and alcohol testing will be applicable starting January 1 of the calendar year following publication.

(c) Rates for drug testing. (1) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 655.72 for the two preceding consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

(2) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of § 655.72 for the calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug or random alcohol testing to 50 percent of all covered employees.

(d) Rates for alcohol testing. (1)(i) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the Administrator may lower this rate to 10 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 655.72 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(ii) When the minimum annual percentage rate for random alcohol testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 655.72 for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(2)(i) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of § 655.72 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent of all covered employees.

(ii) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of § 655.72 for that calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent of all covered employees.

(e) The selection of employees for random drug and alcohol testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each covered employee shall have an equal chance of being tested each time selections are made.

(f) The employer shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rates for random drug and alcohol testing determined by the Administrator. If the employer conducts random drug and alcohol testing through a consortium, the number of employees to be tested may be calculated for each individual employer or may be based on the total number of covered employees covered by the consortium who are subject to random drug and alcohol testing at the same minimum annual percentage rate under this part.

(g) Each employer shall ensure that random drug and alcohol tests conducted under this part are unannounced and unpredictable, and that the dates for administering random tests are spread reasonably throughout the calendar year. Random testing must be conducted at all times of day when safety-sensitive functions are performed.

(h) Each employer shall require that each covered employee who is notified of selection for random drug or random alcohol testing proceed to the test site immediately. If the employee is performing a safety-sensitive function at the time of the notification, the employer shall instead ensure that the employee ceases to perform the safety-sensitive function and proceeds to the testing site immediately.

(i) A covered employee shall only be randomly tested for alcohol misuse while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions. A covered employee may be randomly tested for prohibited drug use anytime while on duty.

(j) If a given covered employee is subject to random drug and alcohol testing under the testing rules of more than one DOT agency for the same employer, the employee shall be subject to random drug and alcohol testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function.

(k) If an employer is required to conduct random drug and alcohol testing under the drug and alcohol testing rules of more than one DOT agency, the employer may—

(1) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or

(2) Randomly select such employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the employer is subject.

§ 655.46 Return to duty following refusal to submit to a test, verified positive drug test result and/or breath alcohol test result of 0.04 or greater.

Where a covered employee refuses to submit to a test, has a verified positive drug test result, and/or has a confirmed alcohol test result of 0.04 or greater, the employer, before returning the employee to duty to perform a safety-sensitive function, shall follow the procedures outlined in 49 CFR Part 40.

§ 655.47 Follow-up testing after returning to duty.

An employer shall conduct follow-up testing of each employee who returns to duty, as specified in 49 CFR Part 40, subpart O.

§ 655.48 Retesting of covered employees with an alcohol concentration of 0.02 or greater but less than 0.04.

If an employer chooses to permit a covered employee to perform a safety-sensitive function within 8 hours of an alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04, the employer shall retest the covered employee to ensure compliance with the provisions of § 655.35. The covered employee may not perform safety-sensitive functions unless the confirmation alcohol test result is less than 0.02.

§ 655.49 Refusal to submit to a drug or alcohol test.

(a) Each employer shall require a covered employee to submit to a post-accident drug and alcohol test required under § 655.44, a random drug and alcohol test required under § 655.45, a reasonable suspicion drug and alcohol test required under § 655.43, or a follow-up drug and alcohol test required under § 655.47. No employer shall permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

(b) When an employee refuses to submit to a drug or alcohol test, the employer shall follow the procedures outlined in 49 CFR Part 40.

§ 655.50 [Reserved]

Subpart F–Drug and Alcohol Testing Procedures

§ 655.51 Compliance with testing procedures requirements.

The drug and alcohol testing procedures in 49 CFR Part 40 apply to employers covered by this part, and must be read together with this part, unless expressly provided otherwise in this part.

§ 655.52 Substance abuse professional (SAP).

The SAP must perform the functions in 49 CFR Part 40.

§ 655.53 Supervisor acting as collection site personnel.

An employer shall not permit an employee with direct or immediate supervisory responsibility or authority over another employee to serve as the urine collection person, breath alcohol technician, or saliva-testing technician for a drug or alcohol test of the employee.

§§ 655.54–655.60 [Reserved]

Subpart G–Consequences

§ 655.61 Action when an employee has a verified positive drug test result or has a confirmed alcohol test result of 0.04 or greater, or refuses to submit to a test.

(a) (1) Immediately after receiving notice from a medical review officer (MRO) or a consortium/third party administrator (C/TPA) that a covered employee has a verified positive drug test result, the employer shall require that the covered employee cease performing a safety-sensitive function.

(2) Immediately after receiving notice from a Breath Alcohol Technician (BAT) that a covered employee has a confirmed alcohol test result of 0.04 or greater, the employer shall require that the covered employee cease performing a safety-sensitive function.

(3) If an employee refuses to submit to a drug or alcohol test required by this part, the employer shall require that the covered employee cease performing a safety-sensitive function.

(b) Before allowing the covered employee to resume performing a safety-sensitive function, the employer shall ensure the employee meets the requirements of 49 CFR Part 40 for returning to duty, including taking a return to duty drug and/or alcohol test.

§ 655.62 Referral, evaluation, and treatment.

If a covered employee has a verified positive drug test result, or has a confirmed alcohol test of 0.04 or greater, or refuses to submit to a drug or alcohol test required by this part, the employer shall advise the employee of the resources available for evaluating and resolving problems associated with prohibited drug use and alcohol misuse, including the names, addresses, and telephone numbers of substance abuse professionals (SAPs) and counseling and treatment programs.

§§ 655.63–655.70 [Reserved]

Subpart H—Administrative Requirements

§ 655. 71 Retention of records.

(a) *General requirement.* An employer shall maintain records of its anti-drug and alcohol misuse program as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) *Period of retention.* In determining compliance with the retention period requirement, each record shall be maintained for the specified minimum period of time as measured from the date of the creation of the record. Each employer shall maintain the records in accordance with the following schedule:

(1) *Five years.* Records of covered employee verified positive drug or alcohol test results, documentation of refusals to take required drug or alcohol tests, and covered employee referrals to the substance abuse professional, and copies of annual MIS reports submitted to FTA.

(2) *Two years.* Records related to the collection process and employee training.

(3) *One year.* Records of negative drug or alcohol test results.

(c) *Types of records.* The following specific records must be maintained:

(1) Records related to the collection process:

(i) Collection logbooks, if used.

(ii) Documents relating to the random selection process.

(iii) Documents generated in connection with decisions to administer reasonable suspicion drug or alcohol tests.

(iv) Documents generated in connection with decisions on post-accident drug and alcohol testing.

(v) MRO documents verifying existence of a medical explanation of the inability of a covered employee to provide an adequate urine or breathe sample.

(2) Records related to test results:

(i) The employer's copy of the custody and control form.

(ii) Documents related to the refusal of any covered employee to submit to a test required by this part.

(iii) Documents presented by a covered employee to dispute the result of a test administered under this part.

(3) Records related to referral and return to duty and follow-up testing: Records concerning a covered employee's entry into and completion of the treatment program recommended by the substance abuse professional.

(4) Records related to employee training:

(i) Training materials on drug use awareness and alcohol misuse, including a copy of the employer's policy on prohibited drug use and alcohol misuse.

(ii) Names of covered employees attending training on prohibited drug use and alcohol misuse and the dates and times of such training.

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for drug and alcohol testing based on reasonable suspicion.

(iv) Certification that any training conducted under this part complies with the requirements for such training.

(5) Copies of annual MIS reports submitted to FTA.

§ 655.72 Reporting of results in a management information system.

(a) Each recipient shall annually prepare and maintain a summary of the results of its anti-drug and alcohol misuse testing programs performed under this part during the previous calendar year.

(b) When requested by FTA, each recipient shall submit to FTA's Office of Safety and Security, or its designated agent, by March 15, a report covering the previous calendar year (January 1 through December 31) summarizing the results of its anti-drug and alcohol misuse programs.

(c) Each recipient shall be responsible for ensuring the accuracy and timeliness of each report submitted by an employer, contractor, consortium or joint enterprise or by a third party service provider acting on the recipient's or employer's behalf.

(d) *Drug use information: Long Form.* Each report that contains information on verified positive drug test results shall be submitted on the FTA Drug Testing Management Information System (MIS) Data Collection Form (Appendix A of this part) and shall include the following informational elements:

(1) Number of FTA covered employees by employee category.

(2) Number of covered employees subject to testing under the anti-drug regulations of the other DOT operating administrations subject to 49 CFR Part 40.

(3) Number of specimens collected by type of test (i.e., pre-employment, follow-up, random, etc.) and employee category.

(4) Number of positives verified by a Medical Review Officer (MRO) by type of test, type of drug, and employee category.

(5) Number of negatives verified by an MRO by type of test and employee category.

(6) Number of persons denied a position as a covered employee following a verified positive drug test.

(7) Number of covered employees verified positive by an MRO or who refused to submit to a drug test, who were returned to duty in covered positions during the reporting period (having complied with the recommendations of a substance abuse professional as described in § 655.61).

(8) Number of employees with tests verified positive by an MRO for multiple drugs.

(9) Number of covered employees who were administered drug and alcohol tests at the same time, with both a verified positive drug test result and an alcohol test result indicating an alcohol concentration of 0.04 or greater.

(10) Number of covered employees who refused to submit to a random drug test required under this part.

(11) Number of covered employees who refused to submit to a non-random drug test required under this part.

(12) Number of covered employees and supervisors who received training during the reporting period.

(13) Number of fatal and nonfatal accidents which resulted in a verified positive post-accident drug test.

(14) Number of fatalities resulting from accidents which resulted in a verified positive post-accident drug test.

(15) Identification of FTA funding source(s).

(e) *Drug Use Information: Short Form.* If all drug test results were negative during the reporting period, the employer must use the ''EZ form'' (Appendix B of this part). It shall contain:

(1) Number of FTA covered employees.

(2) Number of covered employees subject to testing under the anti-drug regulation of the other DOT operating administrations subject to 49 CFR Part 40.

(3) Number of specimens collected and verified negative by type of test and employee category.

(4) Number of covered employees verified positive by an MRO or who refused to submit to a drug test prior to the reporting period and who were returned to duty in covered positions during the reporting period (having complied with the recommendations of a substance abuse professional as described in § 655.62).

(5) Number of covered employees who refused to submit to a non-random drug test required under this part.

(6) Number of covered employees and supervisors who received training during the reporting period.

(7) Identification of FTA funding source(s).

(f) *Alcohol misuse information: Long Form.* Each report that contains information on an alcohol screening test result of 0.02 or greater or a violation of the alcohol misuse provisions of this part shall be submitted on the FTA Alcohol Testing Management (MIS) Data Collection Form (Appendix C of this part) and shall include the following informational elements:

(1) Number of FTA covered employees by employee category.

(2) (i) Number of screening tests by type of test and employee category.

(ii) Number of confirmed tests, by type of test and employee category.

(3) Number of confirmed alcohol tests indicating an alcohol concentration of 0.02 or greater but less than 0.04, by type of test and employee category.

(4) Number of confirmed alcohol tests indicating an alcohol concentration of 0.04 or greater, by type of test and employee category.

(5) Number of covered employees with a confirmed alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in covered positions during the reporting period (having complied with the recommendation of a substance abuse professional as described in § 655.61).

(6) Number of fatal and nonfatal accidents which resulted in a confirmed post-accident alcohol test indicating an alcohol concentration of 0.04 or greater.

(7) Number of fatalities resulting from accidents which resulted in a confirmed post-accident alcohol test indicating an alcohol concentration of 0.04 or greater.

(8) Number of covered employees who were found to have violated other provisions of subpart B of this part and the action taken in response to the violation.

(9) Number of covered employees who were administered alcohol and drug tests at the same time, with a positive drug test result and an alcohol test result indicating an alcohol concentration of 0.04 or greater.

(10) Number of covered employees who refused to submit to a random alcohol test required under this part.

(11) Number of covered employees who refused to submit to a non-random alcohol test required under this part.

(12) Number of supervisors who have received training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

(13) Identification of FTA funding source(s).

(g) *Alcohol Misuse Information: Short Form.* If an employer has no screening test results of 0.02 or greater and no violations of the alcohol misuse provisions of this part, the employer must use the ''EZ'' form (Appendix D of

this part). It shall contain (This report may only be submitted if the program results meet these criteria.):

(1) Number of FTA covered employees.

(2) Number of alcohol tests conducted with results less than 0.02 by type of test and employee category.

(3) Number of employees with confirmed alcohol test results indicating an alcohol concentration of 0.04 or greater prior to the reporting period and who were returned to duty in a covered position during the reporting period.

(4) Number of covered employees who refused to submit to a random alcohol test required under this part.

(5) Number of supervisors who have received training in determining the existence of reasonable suspicion of alcohol misuse during the reporting period.

(6) Identification of FTA funding source(s).

§ 655.73 Access to facilities and records.

(a) Except as required by law, or expressly authorized or required in this section, no employer may release information pertaining to a covered employee that is contained in records required to be maintained by § 655.71.

(b) A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the covered employee's use of prohibited drugs or misuse of alcohol, including any records pertaining to his or her drug or alcohol tests. The employer shall provide promptly the records requested by the employee. Access to a covered employee's records shall not be contingent upon the employer's receipt of payment for the production of those records.

(c) An employer shall permit access to all facilities utilized and records compiled in complying with the requirements of this part to the Secretary of Transportation or any DOT agency with regulatory authority over the employer or any of its employees or to a State oversight agency authorized to oversee rail fixed guideway systems.

(d) An employer shall disclose data for its drug and alcohol testing programs, and any other information pertaining to the employer's anti-drug and alcohol misuse programs required to be maintained by this part, to the Secretary of Transportation or any DOT agency with regulatory authority over the employer or covered employee or to a State oversight agency authorized to oversee rail fixed guideway systems, upon the Secretary's request or the respective agency's request.

(e) When requested by the National Transportation Safety Board as part of an accident investigation, employers shall disclose information related to the employer's drug or alcohol testing related to the accident under investigation.

(f) Records shall be made available to a subsequent employer upon receipt of a written request from the covered employee. Subsequent disclosure by the employer is permitted only as expressly authorized by the terms of the covered employee's request.

(g) An employer may disclose information required to be maintained under this part pertaining to a covered employee to the employee or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of a drug or alcohol test under this part (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the covered employee.)

(h) An employer shall release information regarding a covered employee's record as directed by the specific, written consent of the employee authorizing release of the information to an identified person.

(i) An employer may disclose drug and alcohol testing information required to be maintained under this part, pertaining to a covered employee, to the State oversight agency or grantee required to certify to FTA compliance with the drug and alcohol testing procedures of 49 CFR parts 40 and 655.

§§ 655.74–655.80 [Reserved]

Subpart I—Certifying Compliance

§ 655.81 Grantee oversight responsibility.

A grantee shall ensure that the recipients of funds under 49 U.S.C. 5307, 5309, 5311 or 23 U.S.C. 103(e)(4) comply with this part.

§ 655.82 Compliance as a condition of financial assistance.

(a) *General.* A recipient may not be eligible for Federal financial assistance under 49 U.S.C. 5307, 5309, or 5311 or under 23 U.S.C. 103(e)(4), if a recipient fails to establish and implement an anti-drug and alcohol misuse program as required by this part. Failure to certify compliance with these requirements, as specified in § 655.83, may result in the suspension of a grantee's eligibility for Federal funding.

(b) *Criminal violation.* A recipient is subject to criminal sanctions and fines for false statements or misrepresentations under 18 U.S.C. 1001.

(c) *State's role.* Each State shall certify compliance on behalf of its 49 U.S.C. 5307, 5309, 5311 or 23 U.S.C. 103(e)(4) subrecipients, as applicable. In so certifying, the State shall ensure that each subrecipient is complying with the requirements of this part. A section 5307, 5309, 5311 or 103(e)(4) subrecipient, through the administering State, is subject to suspension of funding from the State if such subrecipient is not in compliance with this part.

§ 655.83 Requirement to certify compliance.

(a) A recipient of FTA financial assistance shall annually certify compliance, as set forth in § 655.82, to the applicable FTA Regional Office.

(b) A certification must be authorized by the organization's governing board or other authorizing official, and must be signed by a party specifically authorized to do so.

(c) A recipient will be ineligible for further FTA financial assistance if the recipient fails to establish and implement an anti-drug and alcohol misuse program in accordance with this part.

Appendixes to Part 655

BILLING CODE 4910–57–P

APPENDIX A TO PART 655 – DRUG TESTING MANAGEMENT INFORMATION SYSTEM (MIS) DATA COLLECTION FORM

INSTRUCTIONS

The following instructions are to be used as a guide for completing the drug testing information in the Federal Transit Administration (FTA) **Drug Testing MIS Data Collection Form**. These instructions outline and explain the information requested and indicate the probable sources for this information. A sample testing results table with a narrative explanation is provided on pages iii-v as an example to facilitate the process of completing the form correctly.

This reporting form includes six sections. Collectively, these sections address the data elements required in the FTA and the U.S. Department of Transportation (DOT) drug testing regulations. The six sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. EMPLOYER INFORMATION	i	1
B. COVERED EMPLOYEES	i	2
C. DRUG TESTING INFORMATION	ii-v	3-4
D. OTHER DRUG TESTING/PROGRAM INFORMATION	v	5
E. DRUG TRAINING/EDUCATION	vi	5
F. FTA FUNDING SOURCES	vi	5

Page 1 **EMPLOYER INFORMATION** (Section A) requires the name of the employer for which the report is done, a current address, contact name, and phone number. Below this, information must be entered for the consortium used (if applicable). Finally, a signature, title and date are required certifying the correctness and completeness of the form. Note: A separate report must be submitted by each FTA recipient for each of its contract service and contract maintenance providers covered by the FTA drug testing regulation.

Page 2 **COVERED EMPLOYEES** (Section B) requires a count for each employee category that must be tested under the FTA drug testing regulation. The employee categories are: Revenue Service Vehicle Operation, Revenue Service Vehicle and Equipment Maintenance, Revenue Service Vehicle Control/Dispatch, Commercial Driver License (CDL) Holders who operate Non-Revenue Service Vehicles, and Security Personnel who carry Firearms. The most likely source for this information is the employer's personnel department. These counts should be based on the recipient's or contractor's records for the reported year. The **TOTAL** is a count of **all** covered employees for **all** categories combined, i.e., the sum of the columns.

Additional information must be completed if the employer has personnel who perform duties also covered by the anti-drug rule of the United States Coast Guard (USCG). NUMBER OF EMPLOYEES COVERED BY THE USCG, requires that you identify the number of employees in each employee category.

Section C is used to summarize the drug testing results for applicants and covered employees. There are six categories of testing to be completed. The first part of the table is where you enter the data on pre-employment testing. The following five parts are for entering drug testing data on random, post-accident, reasonable suspicion, return to duty and follow-up testing, respectively. Items necessary to complete these tables include:

1) the number of specimens collected in each employee category;
2) the number of specimens tested which were verified negative and verified positive for any drug(s); and
3) individual counts of those specimens which were verified positive for each of the five drugs.

Do not include results of quality control (QC) samples submitted to the testing laboratory in any of the tables.

A sample table with detailed instructions is provided for the first part, PRE-EMPLOYMENT testing information. The format and explanations used for the sample apply to all six parts of the table in Section C.

Information on actions taken with those persons testing positive is required at the end of both pages. Specific instructions for providing this latter information are given after the instructions for completing the table in Section C.

Page 3

DRUG TESTING INFORMATION (Section C) requires information for drug testing by category of testing. All numbers entered into the pre-employment category section of the table should be separated into the category of employment for which the person was applying or transferring. The other categories are for employee testing and require information for employees in **covered positions** only. Each part of this table must be completed for each category of testing. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. These numbers **do not** include refusals for testing. A sample section of the table with example numbers is presented on page iv.

Three types of information are necessary to complete the left side of this table. The first blank column with the heading **"NUMBER OF SPECIMENS COLLECTED,"** requires a count for all collected specimens by employee category. The second blank column with the heading **"NUMBER OF SPECIMENS VERIFIED NEGATIVE,"** require a count for all completed tests by employee category that were verified negative by your Medical Review Officer (MRO).

The third blank column with the heading **"NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS,"** refers to the number of specimens provided by applicants or employees that were verified positive. "Verified positive" means the results were verified by your MRO.

The right hand portion of this table, with the heading **"NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG,"** requires counts of positive tests for each of the five drugs for which tests were done, i.e., marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines. The number of specimens positive for each drug should be entered in the appropriate column for that drug type. Again, "verified positive" refers to test results verified by your MRO.

If an applicant or employee tested positive for more than one drug; for example, both marijuana and cocaine, that person's positive results would be included once in each of the appropriate columns (marijuana and cocaine).

Each column in the table should be added and the answer entered in the row marked**: "TOTAL".**

A sample table is provided on page iv with example numbers.

Page 3

Below the part of the table containing pre-employment testing information is a box with the heading **"Number of persons denied a position as a covered employee following a verified positive drug test".** This is simply a count of those persons who were not placed in a covered position because they tested positive for one or more drugs.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section C, **DRUG TESTING INFORMATION**, which summarizes pre-employment testing results. The procedures detailed here also apply to the other categories of testing in Section C which require you to summarize testing results for employees. This example uses the categories "Revenue Vehicle Operation" and "Armed Security Personnel" to illustrate the procedures for completing the form.

A

Urine specimens were collected for 157 applicants for revenue service vehicle operation positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Revenue Vehicle Operation".

B

The Medical Review Officer (MRO) for the employer reported that 153 of those 157 specimens from applicants for revenue service vehicle operation positions were negative (i.e., no drugs were detected). Enter this information in the second blank column of the table in the row marked "Revenue Vehicle Operations".

C

The MRO for the employer reported that 4 of those 157 specimens from applicants for revenue service vehicle operation positions were positive (i.e., a drug or drugs were detected). Enter this information in the third blank column of the table in the row marked "Revenue Vehicle Operation".

D With the 4 specimens that tested positive, the following drugs were detected:

Specimen	Drugs
#1	Marijuana
#2	Amphetamines
#3	Marijuana and Cocaine (Multi-drug specimen)
#4	Marijuana

Marijuana was detected in three (3) specimens, cocaine in one (1), and amphetamines in one (1). This information is entered in the columns on the right hand side of the table under each of these drugs. Two different drugs were detected in specimen #3 (multi-drug) so an entry is made in both the marijuana and the cocaine column for this specimen. Information on multi-drug specimens must also be entered in Section D, **OTHER DRUG TESTING/PROGRAM INFORMATION**, on page 5 of the reporting form.

Please note that the sample data collection form also has information for armed security personnel on line two. The same procedures outlined for revenue service vehicle operation should be followed for entering the data on armed security personnel. With applicants for armed security personnel positions, 107 specimens were collected resulting in 105 verified negatives and 2 verified positives – 1 for marijuana and 1 for opiates. This information is entered in the row marked "Armed Security Personnel".

E The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 specimens from applicants for revenue service vehicle operation positions were collected and 107 for applicants for armed security personnel positions. The total for that columns would be 264 (i.e., 157 + 107). The same procedure should be used for each column, i.e., add all the numbers in that column and place the answer in the last row.

PRE-EMPLOYMENT								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				MARIJUANA (THC)	COCAINE	PHENCY-CLIDINE (PC)	OPIATES	AMPHET-AMINES
REVENUE VEHICLE OPERATION	157	153	4	3	1	0	0	1
ARMED SECURITY PERSONNEL	107	105	2	1	0	0	1	0
TOTAL	264	258	6	4	1	0	1	1

A B C D E

Note that adding up the numbers for each type of drug in a row ("NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG") will not always match the number entered in the third column, "NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS". The total for the numbers on the right hand side of the table may differ from the number of specimens testing positive since some specimens may contain more than one drug.

Remember that the same procedures indicated above are to be used for completing all of the categories for testing in Section C.

Page 4 — Following the table that summarizes **DRUG TESTING INFORMATION**, you must provide counts of fatal and non-fatal accidents and fatalities which resulted in positive post-accident drug tests for any employee involved in the accident. This information should be available from the safety program manager or the drug program manager.

Page 4 — Also following the table that summarizes **DRUG TESTING INFORMATION**, you must provide a count of employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FTA rule. This information should be available from the personnel office and/or drug program manager.

Page 5 — **OTHER DRUG TESTING/PROGRAM INFORMATION** (Section D) requires that you complete a table dealing with specimens positive for more than one drug, employees testing positive for both drugs and alcohol, and a table dealing with employees who refused to submit to a drug test.

Page 5 — **SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG** requires information on specimens that contained more than one drug. Indicate the **EMPLOYEE CATEGORY** and the **NUMBER OF VERIFIED POSITIVES**. Then specify the combination of drugs reported as positive by placing the number in the appropriate columns. For example, if marijuana and cocaine were detected in 3 revenue vehicle operator specimens, then you would write "Revenue Vehicle Operation" as the employee category, "3" as the number of verified positives, and "3" in the columns for "Marijuana" and "Cocaine". If marijuana and opiates were detected in 2 revenue vehicle operator specimens, then you would write "Revenue Vehicle Operation" as the employee category, "2" as the number of verified positives, and "2" in the columns for "Marijuana" and "Opiates".

Page 5 — Next you must provide a count of **employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater.**

Page 5 — **EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST** requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a **random** or **non-random** (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) drug test required under the FTA regulation.

Page 5 — **DRUG TRAINING/EDUCATION** (Section E) requires information on the number of covered employees and supervisory personnel who have received drug training during the current reporting period.

Page 5 — **FTA FUNDING SOURCES** (Section F) asks for the sources of FTA funds for your organization. Simply place a check mark by each applicable funding section(s).

For FTA Use Only

FTA DRUG TESTING MIS DATA COLLECTION FORM **OMB No. 2132-0556**

YEAR COVERED BY THIS REPORT: 20 _____

A. EMPLOYER INFORMATION

Name _____

Address _____

_____

Contact _____

Phone _____

Consortium Used (if applicable)

Name _____

Address _____

_____

Contact _____

Phone _____

I, the undersigned, certify that the information provided on this Federal Transit Administration Drug Testing Management Information System Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

_____ _____

Signature Date of Signature

_____

Title

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of $10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

The Federal Transit Administration estimates that the average burden for this report form is 8 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Office of Safety and Security (TPM-30), Federal Transit Administration; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2132-0556); Washington, D.C. 20503.

B. COVERED EMPLOYEES

COVERED EMPLOYEES		
EMPLOYEE CATEGORY	NUMBER OF FTA COVERED EMPLOYEES	NUMBER OF EMPLOYEES COVERED BY THE USCG
Revenue Vehicle Operation		
Revenue Vehicle and Equipment Maintenance		
Revenue Vehicle Control/Dispatch		
CDL/Non-Revenue Vehicle		
Armed Security Personnel		
TOTAL		

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the **current** reporting period **only** (for example, January 1, 1994 – December 31, 1994

2. This report is only for testing **REQUIRED BY THE FEDERAL TRANSIT ADMINISTRATION (FTA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT).**

   - Results should be reported only for employees in **COVERED POSITIONS** as defined by the FTA drug testing regulation.

   - The information requested should only include testing for marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines using the standard procedures required by DOT regulation 49 CFR Part 40.

3. Information on refusals for testing should only be reported in Section D ["OTHER DRUG TESTING INFORMATION"]. Do not include refusals for testing in other sections of this report.

4. Do not include the results of any quality control (QC) samples submitted to the testing laboratory in any of the tables.

5. Complete all items; DO NOT LEAVE ANY ITEM BLANK. If the value for an item is zero (0), place a zero (0) on the form.

This part of the form requires information on VERIFIED POSITIVE and VERIFIED NEGATIVE drug tests. These are the results that are reported to you by your Medical Review Officer (MRO).

C. DRUG TESTING INFORMATION

EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PC)	Opiates	Amphetamines
PRE-EMPLOYMENT								
Revenue Vehicle Operations								
Revenue Vehicle and Equipment Maintenance								
Revenue Vehicle Control/Dispatch								
CDL/Non-Revenue Vehicle								
Armed Security Personnel								
Total								
RANDOM								
Revenue Vehicle Operation								
Revenue Vehicle and Equipment Maintenance								
Revenue Vehicle Control/Dispatch								
CDL/Non-Revenue Vehicle								
Armed Security Personnel								
Total								
POST-ACCIDENT								
Revenue Vehicle Operation								
Revenue Vehicle and Equipment Maintenance								
Revenue Vehicle Control/Dispatch								
CDL/Non-Revenue Vehicle								
Armed Security Personnel								
Total								
Number of persons denied a position as a covered employee following a verified positive drug test:								

C. DRUG TESTING INFORMATION (cont.)

EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PC)	Opiates	Amphetamines
REASONABLE SUSPICION								
Revenue Vehicle Operation								
Revenue Vehicle and Equipment Maintenance								
Revenue Vehicle Control/Dispatch								
CDL/Non-Revenue Vehicle								
Armed Security Personnel								
Total								
RETURN TO DUTY								
Revenue Vehicle Operations								
Revenue Vehicle and Equipment Maintenance								
Revenue Vehicle Control/Dispatch								
CDL/Non-Revenue Vehicle								
Armed Security Personnel								
Total								
FOLLOW-UP								
Revenue Vehicle Operation								
Revenue Vehicle and Equipment Maintenance								
Revenue Vehicle Control/Dispatch								
CDL/Non-Revenue Vehicle								
Armed Security Personnel								
Total								

Number of accidents, as defined by the FTA drug testing regulation, which resulted in a positive post-accident drug test:	FATAL	NON-FATAL
Number of fatalities resulting from accidents which resulted in a positive post-accident drug test:		
Number of employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FTA rule:		

D. OTHER DRUG TESTING/PROGRAM INFORMATION

SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG						
EMPLOYEE CATEGORY	NUMBER OF VERIFIED POSITIVES	Marijuana (THC)	Cocaine	Phency-clidine (PCP)	Opiates	Amphet-amines

Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater:	
EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST	Number
Covered employees who refused to submit to a random drug test required under the FTA regulation:	
Covered employees who refused to submit to a non-random drug test required under the FTA regulation:	

E. DRUG TRAINING/EDUCATION

TRAINING DURING CURRENT REPORTING PERIOD	Number
Covered employees who have received at least 60 minutes of initial training on the consequences, manifestations, and behavioral cues of drug use as required by the FTA drug testing regulation:	
Supervisory personnel who have received 60 minutes of initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use as required by the FTA drug testing regulation:	

F. FTA FUNDING SOURCES

FTA FUNDING SOURCES				
Check all sections that apply:	5307	5309	5310	5311

APPENDIX B TO PART 655 – DRUG TESTING MANAGEMENT INFORMATION SYSTEM (MIS) "EZ" DATA COLLECTION FORM

INSTRUCTIONS

The following instructions are to be used as a guide for completing the Federal Transit Administration (FTA) **Drug Testing MIS "EZ" Data Collection Form**. This form should only be used if there are **no positive tests** to be reported by your company. These instructions outline and explain the information requested and indicate the probable sources for this information. This reporting form includes four sections. These sections address the data elements required in the FTA and the U.S. Department of Transportation (DOT) drug testing regulations.

SECTION A – EMPLOYER INFORMATION requires the company name for which the report is done, a current address, contact name, and phone number. Below this, information must be entered for the consortium used (if applicable). Finally, a signature, title, and date are required certifying the correctness and completeness of the form. Also indicate the year covered by this report. Note: A separate report must be submitted by each FTA recipient for each of its contract service and contract maintenance providers covered by the FTA drug testing regulation.

SECTION B – COVERED EMPLOYEES requires a count for each employee category that must be tested under the FTA drug testing regulation. The employee categories are: Revenue Service Vehicle Operation, Revenue Service Vehicle and Equipment Maintenance, Revenue Service Vehicle Control/Dispatch, Commercial Driver License (CDL) Holders who operate Non-Revenue Service Vehicles, and Security Personnel who carry Firearms. The most likely source for this information is the employer's personnel department. These counts should be based on the recipient's or contractor's records for the reported year. The TOTAL is a count of **all** covered employees for **all** categories combined, i.e., the sum of the columns.

Additional information must be completed if the employer has personnel who perform duties also covered by the anti-drug rule of the United States Coast Guard (USCG). **NUMBER OF EMPLOYEES COVERED BY THE USCG**, requires that you identify the number of employees in each employee category.

SECTION C – DRUG TESTING INFORMATION requires information for drug testing, refusal for testing, and training. The first table requests information on the **NUMBER OF SPECIMENS COLLECTED AND VERIFIED NEGATIVE** in each category for testing. All numbers entered into the pre-employment category section of the table should be separated into the category of employment for which the person was applying or transferring. The other categories are for employee testing and require information for employees in **covered positions** only. Each part of this table must be completed for each category of testing. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. **"COLL"** requires the number of specimens collected in each employee category for each category of testing. **"NEG"** requires a count for all completed tests by employee category that were verified negative by your Medical Review Officer (MRO). Do not include results of quality control (QC) samples submitted to the testing laboratory in any of the categories. Each column in the table should be added and the answer entered in the row marked **"TOTAL"**.

Following the table that summarizes **DRUG TESTING INFORMATION**, you must provide a count of **employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FTA rule**. This information should be available from the personnel office and/or drug program manager.

EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST requires a count of the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a **random** or **non-random** (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) drug test required under the FTA regulation.

DRUG TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD requires information on the number of covered employees and supervisory personnel who have received drug training during the current reporting period.

SECTION D – FTA FUNDING SOURCES asks for the sources of FTA funds for your organization. Simply place a check mark by each applicable funding section(s).

For FTA Use Only

FTA DRUG TESTING MIS "EZ" DATA COLLECTION FORMOMB No. 2132-0556

YEAR COVERED BY THIS REPORT: 20 _____

A. EMPLOYER INFORMATION

Company Name _____

Address _____

_____

Contact _____

Phone _____

Consortium Used (if applicable)

Name _____

Address _____

_____

Contact _____

Phone _____

I, the undersigned, certify that the information provided on the attached Federal Transit Administration Drug Testing Management Information System "EZ" Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

_____ _____

Signature Date of Signature

_____

Title

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of $10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

The Federal Transit Administration estimates that the average burden for this report form is 8 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Office of Safety and Security (TPM-30), Federal Transit Administration; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2132-0556); Washington, D.C. 20503.

B. COVERED EMPLOYEES

COVERED EMPLOYEES		
EMPLOYEE CATEGORY	NUMBER FTA COVERED EMPLOYEES	NUMBER OF EMPLOYEES COVERED BY THE USCG
Revenue Vehicle Operation		
Revenue Vehicle and Equipment Maintenance		
Revenue Vehicle Control/Dispatch		
CDL/Non-Revenue Vehicle		
Armed Security Personnel		
Total		

C. DRUG TESTING INFORMATION

NUMBER OF SPECIMENS COLLECTED AND VERIFIED NEGATIVE												
EMPLOYEE CATEGORY	PRE-EMPLOYMENT		RANDOM		POST-ACCIDENT		REASONABLE SUSPICISION		RETURN TO DUTY		FOLLOW-UP	
	COLL	NEG	COLL	NEG	COLL	NEG	COLL	NEG	COLL	NEG	COLL	NEG
Revenue Vehicle Operations												
Revenue Vehicle and Equipment Maintenance												
Revenue Vehicle Control/Dispatch												
CDL/Non-Revenue Vehicle												
Armed Security Personnel												
Total												

Number of employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FTA rule:	
EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST	**Number**
Covered employees who refused to submit to a random drug test required under the FTA regulation:	
Covered employees who refused to submit to a non-random drug test required under the FTA regulation:	
DRUG TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD	Number
Covered employees who have received at least 60 minutes of initial training on the consequences, manifestations, and behavioral cues of drug use as required by the FTA drug testing regulation:	
Supervisory personnel who have received 60 minutes of initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use as required by the FTA drug testing regulation:	

D. FTA FUNDING SOURCES

FTA FUNDING SOURCES				
Check all sections that apply:	5307	5309	5310	5311

APPENDIX C TO PART 655 – ALCOHOL TESTING MANAGEMENT INFORMATION SYSTEM (MIS) DATA COLLECTION FORM

INSTRUCTIONS

The following instructions are to be used as a guide for completing the alcohol testing information in the Federal Transit Administration (FTA) **Alcohol Testing MIS Data Collection Form**. These instructions outline and explain the information requested and indicate the probable sources for this information. A sample testing results table with a narrative explanation is provided on pages iii-iv as an example to facilitate the process of completing the form correctly.

This reporting form includes six sections. Collectively, these sections address the data elements required in the FTA and the U.S. Department of Transportation (DOT) alcohol testing regulations. The six sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. EMPLOYER INFORMATION	i	1
B. COVERED EMPLOYEES	i	2
C. ALCOHOL TESTING INFORMATION	ii-iv	3-4
D. OTHER ALCOHOL TESTING/PROGRAM INFORMATION	v	5
E. ALCOHOL TRAINING/EDUCATION	v	5
F. FTA FUNDING SOURCES	v	5

Page 1 **EMPLOYER INFORMATION** (Section A) requires the year covered by this report, the agency name for which the report is done, a current address, a person's name and phone number to contact if there are any questions about the report. Below this, information must be entered for the consortium used (if applicable). Finally, a signature, title and date are required certifying the correctness and completeness of the form. Note: A separate report must be submitted by each FTA recipient for each of its contract service and contract maintenance providers covered by the FTA alcohol testing regulation.

Page 2 **COVERED EMPLOYEES** (Section B) requires a count for each employee category that must be tested under the FTA alcohol testing regulation. The employee categories are: Revenue Service Vehicle Operation, Revenue Service Vehicle and Equipment Maintenance, Revenue Service Vehicle Control/Dispatch, Commercial Driver License (CDL) Holders who operate Non-Revenue Service Vehicles, and Security Personnel who carry Firearms. The most likely source for this information is the employer's personnel department. These counts should be based on the recipient's or contractor's records for the reported year. The **TOTAL** is a count of **all** covered employees for **all** categories combined, i.e., the sum of the columns.

Page 3

ALCOHOL TESTING INFORMATION (Section C) requires information for alcohol testing by category of testing. All numbers entered into the pre-employment category section of the table should be separated into the category of employment for which the person was applying or transferring. The other categories are for employee testing and require information for employees in **covered positions** only. Each part of this table must be completed for each category of testing. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. These numbers **do not** include refusals for testing. A sample section of the table with example numbers is presented on page iv.

Four types of information are necessary to complete this table. The first blank column with the heading "**NUMBER OF SCREENING TESTS**," requires a count for all screening tests conducted for each employee category. The second blank column with the heading "**NUMBER OF CONFIRMATION TESTS**," requires a count for all confirmation alcohol tests performed for each employee category.

The third blank column with the heading "**NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO 0.02, BUT LESS THAN 0.04,"** requires a count for each employee category of completed alcohol tests that resulted in an alcohol concentration equal to or greater than 0.02, but less than 0.04.

The fourth blank column with the heading **"NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04,"** requires a count for each employee category of completed alcohol tests that resulted in an alcohol concentration equal to or greater than 0.04. **Note: For return to duty testing, a confirmation result equal to or greater than 0.02 is a violation of the alcohol rule. Therefore, if the number of results equal to or greater than 0.04 is unknown, you may report all results in the third column of the table.**

Each column in the table should be added and the answer entered in the row marked **"TOTAL".**

A sample table is provided on page iv with example numbers.

Page 3

Below the part of the table containing pre-employment testing information are three boxes. This information should be available from the safety program manager or the alcohol program manager.

1) **"Number of persons denied a position as a covered employee following a pre-employment alcohol test indicating an alcohol concentration of 0.04 or greater".** This is a count of those persons who were not placed in a covered position because they took a breath test that resulted in an alcohol concentration of 0.04 or higher.

2) **"Number of accidents, as defined by the FTA alcohol testing regulation, which resulted in a post-accident alcohol testing indicating an alcohol concentration of 0.04 or greater".** This is a count of fatal and non-fatal accidents which resulted in post-accident breath alcohol tests indicating a concentration of 0.04 or greater for any employees involved in the accident.

3) **"Number of fatalities resulting from accidents which resulted in a post-accident alcohol test indicating an alcohol concentration of 0.04 or greater".** This is a count of fatalities in accidents which resulted in post-accident alcohol tests indicating a concentration of 0.04 or greater for any employees involved in the fatal accidents.

Page 4

Following the table that summarizes **ALCOHOL TESTING INFORMATION**, you must provide the **number of employees who engaged in alcohol misuse who were returned to duty in a covered position during this reporting period (having complied with the recommendations of a substance abuse professional as described in FTA regulations)**. This information should be available from the personnel office and/or alcohol program manager.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section C, **ALCOHOL TESTING INFORMATION**, which summarizes pre-employment testing results. The procedures detailed here also apply to the other categories of testing in Section C which require you to summarize testing results for employees. This example uses the categories "Revenue Vehicle Operation" and "Armed Security Personnel" to illustrate the procedures for completing the form.

A

Screening tests were performed on 157 job applicants for revenue vehicle operator positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Revenue Vehicle Operation".

B

Confirmation tests were necessary for 6 of the 157 applicants for revenue vehicle operator positions. Enter this information in the second blank column of the table in the row marked "Revenue Vehicle Operation". The confirmation test results for these 6 applicants were the following:

Applicant	Confirmation Result
#1	0.06
#2	0.01
#3	0.11
#4	0.04
#5	0.03
#6	0.02

C

The confirmation test results for 2 of the applicants for revenue vehicle operator positions were equal to or greater than 0.02, but less than 0.04. Enter this information in the fourth blank column of the table in the row marked "Revenue Vehicle Operation".

D The confirmation test results for 3 of the applicants for revenue vehicle operator positions were equal to or greater than 0.04. Enter this information in the third blank column of the table in the row marked "Revenue Vehicle Operation".

E The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 applicants for revenue vehicle operator positions and 107 applicants for armed security personnel positions were subjected to screening tests. The total for that column would be 264 (i.e., 157 + 107). The same procedure should be used for each column. (i.e., add all the numbers in that column and place the answer in the last row).

Please note that our sample data collection form also has information for armed security personnel on line two. The same procedures outlined for revenue vehicle operators should be followed for entering the data on armed security personnel. With applicants for armed security personnel positions, 107 screening tests conducted resulting in 3 confirmation tests. No confirmation results were equal to or greater than 0.02, but less than 0.04; and the confirmation test result for 1 of the armed security personnel applicants was equal to or greater than 0.04. This information is entered in the row marked "Armed Security Personnel".

PRE-EMPLOYMENT				
EMPLOYEE CATEGORY	NUMBER OF SCREENING TESTS	NUMBER OF CONFIRMATION TESTS	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04
REVENUE VEHICLE OPERATION	157	6	2	3
ARMED SECURITY PERSONNEL	107	3	8	1
TOTAL	264	5	2	4

A B C D E

Note that adding up the numbers for confirmation results in columns three and four will not always match the number entered in the second column, **"NUMBER OF CONFIRMATION TESTS"**. These numbers may differ since some confirmation test results may be less than 0.02.

Remember that the same procedures indicated above are to be used for completing all of the categories for testing in Section C.

Page 5 **OTHER ALCOHOL TESTING/PROGRAM INFORMATION** (Section D) requires information on employees tested for drugs and alcohol at the same time and that you complete a table dealing with violations of other alcohol provisions/prohibitions of the regulation and a table dealing with employees who refused to submit to an alcohol test.

Page 5 **Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater,** requires that a count of all such employees be entered in the indicated box.

Page 5 **VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION** requires supplying the number of covered employees who used alcohol prior to performing a safety-sensitive function, while performing a safety-sensitive function, and before taking a required post-accident alcohol test. The action taken with covered employees who violate any of these FTA alcohol regulation provisions is also to be supplied. Other violations not delineated in this table may also be provided.

Page 5 **EMPLOYEE WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST** requires information the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a **random** or **non-random** (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) alcohol test required under the FTA regulation.

Page 5 **ALCOHOL TRAINING/EDUCATION** (Section E) requires information on the number of supervisory personnel who have received alcohol training during the current reporting period.

Page 5 **FTA FUNDING SOURCES** (Section F) asks for the sources of FTA funds for your organization. Simply place a check mark by each applicable funding section.

For FTA Use Only

FTA ALCOHOL TESTING MIS DATA COLLECTION FORM OMB No. 2132-0557

YEAR COVERED BY THIS REPORT: 20 _____

A. EMPLOYER INFORMATION

Name _____

Address _____

_____

Contact _____

Phone _____

Consortium Used (if applicable)

Name _____

Address _____

_____

Contact _____

Phone _____

I, the undersigned, certify that the information provided on this Federal Transit Administration Alcohol Testing Management Information System Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

_____ _____

Signature Date of Signature

_____

Title

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of $10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

The Federal Transit Administration estimates that the average burden for this report form is 8 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Office of Safety and Security (TPM-30), Federal Transit Administration; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2132-0557); Washington, D.C. 20503.

B. COVERED EMPLOYEES

COVERED EMPLOYEES	
EMPLOYEE CATEGORY	NUMBER OF FTA COVERED EMPLOYEES
Revenue Vehicle Operation	
Revenue Vehicle and Equipment Maintenance	
Revenue Vehicle Control/Dispatch	
CDL/Non-Revenue Vehicle	
Armed Security Personnel	
Total	

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the **current** reporting period **only** (for example, January 1, 1994 – December 31, 1994).

2. This report is only for testing **REQUIRED BY THE FEDERAL TRANSIT ADMINISTRATION (FTA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT):**

   - Results should be reported only for employees in **COVERED POSITIONS** as defined by the FTA alcohol testing regulation.

   - The information requested should only include testing for alcohol using the standard procedures required by DOT regulation 49 CFR Part 40.

3. Information on refusals for testing should only be reported in Section D ["OTHER ALCOHOL TESTING INFORMATION"]. Do not include refusals for testing in other sections of this report.

5. Complete all items; DO NOT LEAVE ANY ITEM BLANK. If the value for an item is zero (0), place a zero (0) on the form.

C. ALCOHOL TESTING INFORMATION

EMPLOYEE CATEGORY	NUMBER OF SCREENING TESTS	NUMBER OF CONFIRMATION TESTS	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04
PRE-EMPLOYMENT				
Revenue Vehicle Operations				
Revenue Vehicle and Equipment Maintenance				
Revenue Vehicle Control/Dispatch				
CDL/Non-Revenue Vehicle				
Armed Security Personnel				
Total				
RANDOM				
Revenue Vehicle Operation				
Revenue Vehicle and Equipment Maintenance				
Revenue Vehicle Control/Dispatch				
CDL/Non-Revenue Vehicle				
Armed Security Personnel				
Total				
POST-ACCIDENT				
Revenue Vehicle Operation				
Revenue Vehicle and Equipment Maintenance				
Revenue Vehicle Control/Dispatch				
CDL/Non-Revenue Vehicle				
Armed Security Personnel				
Total				

Number of persons denied a position as a covered employee following a pre-employment alcohol test indicating an alcohol concentration of 0.04 or greater.		
Number of accidents, as defined by the FTA alcohol testing regulation, which resulted in a post-accident alcohol test indicating an alcohol concentration of 0.04 or greater:	FATAL	NON-FATAL
Number of fatalities resulting from accidents which resulted in a post-accident alcohol test indicating an alcohol concentration of 0.04 or greater.		

C. ALCOHOL TESTING INFORMATION (cont.)

EMPLOYEE CATEGORY	NUMBER OF SCREENING TESTS	NUMBER OF CONFIRMATION TESTS	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04
REASONABLE SUSPICION				
Revenue Vehicle Operation				
Revenue Vehicle and Equipment Maintenance				
Revenue Vehicle Control/Dispatch				
CDL/Non-Revenue Vehicle				
Armed Security Personnel				
Total				
RETURN TO DUTY				
Revenue Vehicle Operation				
Revenue Vehicle and Equipment Maintenance				
Revenue Vehicle Control/Dispatch				
CDL/Non-Revenue Vehicle				
Armed Security Personnel				
Total				
FOLLOW-UP				
Revenue Vehicle Operations				
Revenue Vehicle and Equipment Maintenance				
Revenue Vehicle Control/Dispatch				
CDL/Non-Revenue Vehicle				
Armed Security Personnel				
Total				

Number of employees who engaged in alcohol misuse who were returned to duty in a covered position during this reporting period (having complied with the recommendations of a substance abuse professional as described in FTA regulations):	

D. OTHER ALCOHOL TESTING/PROGRAM INFORMATION

Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater:	

VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION		
NUMBER OF COVERED EMPLOYEES	VIOLATION	ACTION TAKEN
	Covered employee used alcohol while performing safety-sensitive function.	
	Covered employee used alcohol within 4 hours of performing safety-sensitive function.	
	Covered employee used alcohol before taking a required post-accident alcohol test.	

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST	Number
Covered employees who refused to submit to a random alcohol test required under the FTA regulation:	
Covered employees who refused to submit to a non-random alcohol test required under the FTA regulation:	

E. ALCOHOL TRAINING/EDUCATION

TRAINING DURING CURRENT REPORTING PERIOD	Number
Supervisory personnel who have received 60 minutes of initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FTA alcohol testing regulations:	

E. FTA FUNDING SOURCES

FTA FUNDING SOURCES				
Check all sections that apply:	5307	5309	5310	5311

APPENDIX D TO PART 655 – ALCOHOL TESTING MANAGEMENT INFORMATION SYSTEM (MIS) "EZ" DATA COLLECTION FORM

The following instructions are to be used as a guide for completing the Federal Transit Administration (FTA) **Alcohol Testing MIS "EZ" Data Collection Form**. This form should only be used if there is **no alcohol misuse** to be reported by your company. These instructions outline and explain the information requested and indicate the probable sources for this information. This reporting form includes four sections. These sections address the data elements required in the FTA and the U.S. Department of Transportation (DOT) alcohol testing regulations.

SECTION A – EMPLOYER INFORMATION requires the year covered by this report, the agency name for which the report is done, a current address, and a person's name and phone number to contact if there are any questions about the report. Below this, information must be entered for the consortium used (if applicable). Finally, a signature, title, and date are required certifying the correctness and completeness of the form. Note: A separate report must be submitted by each FTA recipient for each of its contract service and contract maintenance providers covered by the FTA drug testing regulation.

SECTION B – COVERED EMPLOYEES requires a count for each employee category that must be tested under the FTA alcohol testing regulation. The employee categories are: Revenue Service Vehicle Operation, Revenue Service Vehicle and Equipment Maintenance, Revenue Service Vehicle Control/Dispatch, Commercial Driver License (CDL) Holders who operate Non-Revenue Service Vehicles, and Security Personnel who carry Firearms. The most likely source for this information is the employer's personnel department. These counts should be based on the recipient's or contractor's records for the reported year. The TOTAL is a count of **all** covered employees for **all** categories combined, i.e., the sum of the columns.

SECTION C – ALCOHOL TESTING INFORMATION requires information for alcohol testing, refusal for testing, and training/education. The first table requests information on the **NUMBER OF ALCOHOL SCREENING TESTS CONDUCTED** in each category for testing. All numbers entered into the pre-employment category section of the table should be separated into the category of employment for which the person was applying or transferring. The other categories are for employee testing and require information for employees in **covered positions** only. Enter the number of alcohol screening tests conducted by employee category for each category of testing. Testing categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. Each column in the table should be added and the answer entered in the row marked **"TOTAL"**.

Following the table that summarizes **ALCOHOL TESTING INFORMATION**, you must provide a count of **employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in the FTA regulation**). This information should be available from the personnel office and/or alcohol program manager.

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST requires a count of the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a **random** or **non-random** (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) alcohol test required under the FTA regulation.

ALCOHOL TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD requires information on the number of supervisory personnel who have received alcohol training during the current reporting period.

SECTION D – FTA FUNDING SOURCES asks for the sources of FTA funds for your organization. Simply place a check mark by each applicable funding section.

For FTA Use Only

FTA ALCOHOL TESTING MIS "EZ" DATA COLLECTION FORM OMB No. 2132-0557
(No Alcohol Misuse)

YEAR COVERED BY THIS REPORT: 20 _____

A. EMPLOYER INFORMATION

Company Name _____

Address _____

_____

Contact _____

Phone _____

Consortium Used (if applicable)

Name _____

Address _____

_____

Contact _____

Phone _____

I, the undersigned, certify that the information provided on the attached Federal Transit Administration Alcohol Testing Management Information System "EZ" Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

_____ _____
Signature Date of Signature

_____
Title

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of $10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

The Federal Transit Administration estimates that the average burden for this report form is 8 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Office of Safety and Security (TPM-30), Federal Transit Administration; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2132-0557); Washington, D.C. 20503.

B. COVERED EMPLOYEES

COVERED EMPLOYEES	
EMPLOYEE CATEGORY	NUMBER FTA COVERED EMPLOYEES
Revenue Vehicle Operation	
Revenue Vehicle and Equipment Maintenance	
Revenue Vehicle Control/Dispatch	
CDL/Non-Revenue Vehicle	
Armed Security Personnel	
Total	

C. ALCOHOL TESTING INFORMATION

NUMBER OF ALCOHOL SCREENING TESTS CONDUCTED						
EMPLOYEE CATEGORY	PRE-EMPLOYMENT	RANDOM	POST-ACCIDENT	REASONABLE SUSPICION	RETURN TO DUTY	FOLLOW-UP
Revenue Vehicle Operation						
Revenue Vehicle and Equipment Maintenance						
Revenue Vehicle Control/Dispatch						
CDL/Non-Revenue Vehicle						
Armed Security Personnel						
Total						
Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in the FTA regulation):						

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST	**Number**
Covered employees who refused to submit to a random alcohol test required under the FTA regulation:	
Covered employees who refused to submit to a non-random alcohol test required under the FTA regulation:	
ALCOHOL TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD	Number
Supervisory personnel who have received 60 minutes of initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FTA alcohol testing regulations:	

D. FTA FUNDING SOURCES

FTA FUNDING SOURCES				
Check all sections that apply:	5307	5309	5310	5311

Issued on: July 27, 2001.

Jennifer L. Dorn,

Administrator, Federal Transit Administration.

[FR Doc. 01–19234 Filed 8–2–01; 4:41 pm]

BILLING CODE 4910–57–C